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THE SOCIAL FORUM

Working paper submitted by Mr. José Bengoa pursuant to Sub-Commission resolution 2001/24 * **

* This working paper was submitted on 12 June 2002 in order to take into account the necessary methodology for the organization of the first session of the Social Forum pursuant to Commission on Human Rights decision 2002/106 to authorize the holding of the Social Fourm over the two days prior to the Sub-Commission's fifty-fourth session.

** The views expressed herein do not necessarily reflect those of the Sub-Commission, its members or the United Nations

GE.02-14228 (E) 250702 260702

1. The Sub-Commission on the Promotion and Protection of Human Rights, in its resolution 2001/24, requested Mr. José Bengoa, a Sub-Commission member, to prepare a preliminary working paper outlining the methodology and work of the Social Forum. This report is to inform the Sub-Commission of the concept, role and objectives of the Social Forum.

I. SOCIAL FORUM: A NEEDED INSTITUTION

2. On 25 and 26 July 2002 the first session of the Social Forum will be held at the Palais des Nations, Geneva. It will offer a new forum for debate within the United Nations for analysis of the relationship between globalization and human rights, in particular economic, social and cultural rights, in a globalized world.

3. The Commission on Human Rights, in its decision 2002/106 of 22 April 2002, approved the request made by the Sub-Commission to request the Economic and Social Council to authorize the holding in Geneva of a pre-sessional forum on economic, social and cultural rights before the fifty-fourth session of the Sub-Commission, to be known as the "Social Forum", for two days, with the participation of 10 members of the Sub-Commission, taking into account regional representation. Invitations to participate in the Social Forum will be extended to international agencies, Governments, non-governmental organizations, citizens' organizations and associations, public figures and academics, workers' organizations, private and government international cooperation agencies and human rights institutions.[1]

4. The Sub-Commission on the Promotion and Protection of Human Rights spent a number of years discussing the possibility of holding such an annual meeting and establishing within the Organization a forum for debate on the complex realities of today's world. Over the past 10 years the Sub-Commission has refocused its priorities on the study of economic, social and cultural rights, with the understanding that this is a fundamental area of human rights which has not always been analysed in depth or on the same terms as civil and political rights.

5. In the early 1990s the set of pioneering, up-to-date studies by Mr. Danilo Türk, in particular, drew attention to the profound changes for human rights represented by the new world situation. The studies led to growing interest in this subject area, with: (a) the reports on human rights and extreme poverty submitted by Mr. Leandro Despouy, of Argentina; (b) the set of studies prepared by Mr. Asbjørn Eide, of Norway, especially his preparatory document on income distribution and human rights (1994) and his studies on the right to food (1999 and 2000); (c) the studies on transnational corporations, reparation and international

law and the impact on human rights in general and economic, social and cultural rights in particular, the right to drinking water and other studies prepared by Mr. El Hadji Guissé, of Senegal; (d) the studies on globalization, international trade and their impact on human rights prepared by Mr. Joseph Oloka-Onyango, of Uganda, and Ms. Deepika Udagama, of Sri Lanka (1999 and 2000); (e) those prepared by Mr. David Weissbrodt, of the United States of America, on codes of conduct for transnational corporations and the material of the Sub-Commission's working group on the working methods and activities of transnational corporations; (f) those on education and human rights by Mr. Mustapha Mehedi, of Algeria; and (g) numerous other reports and documents in this field which have been prepared or are in preparation by these and other bodies.[2]

6. The proposal for the establishment of a social forum arose from the conclusions of the study entitled "the relationship between the enjoyment of human rights, in particular economic, social and cultural rights, and income distribution" (E/CN.4/Sub.2/1995/14, E/CN.4/Sub.2/1996/14, E/CN.4/Sub.2/1997/9 and E/CN.4/Sub.2/1998/8). This study noted the appearance of new actors on the world scene, and pointed out that the process of globalization complicated the world scene to such an extent that new forums for debate were required, as those in existence were limited and inadequate. The studies also noted that those engaged in human rights debates were generally unaware of debate on global economic decisions, and those engaged in the latter were certainly unaware of the former. Lastly, it was noted that the voices of those who suffered or benefited from the effects and impact of globalization were not always heard at the forums at which decisions were taken and that it was the duty of the United Nations to establish bridges between the various actors involved.

7. Over the past six years the Sub-Commission has discussed these ideas and proposals and adopted various resolutions on the establishment of the Social Forum as a means of following up on this work and accumulated knowledge and providing an appropriate forum for debate on these important issues. In August 2001 a preparatory meeting was held at the Palais des Nations at Geneva, attended by a number of public figures, directors of international agencies, representatives of non-governmental organizations, international trade union organizations and citizens' associations. The session was opened by the United Nations High Commissioner for Human Rights, Mary Robinson, who gave her support to the initiative, as did many directors of intergovernmental agencies and international non-governmental organizations at the meeting. While it is the case that over the years during which this Social Forum was being prepared other

initiatives of great importance emerged (World Social Forum, Porto Alegre, Brazil; World Economic Forum, Davos, Switzerland; etc.), it is also the case that in terms of intergovernmental agencies, and the United Nations system, there was no annual forum where these matters could be discussed openly and at which all the actors involved in globalization could be present.

8. The Social Forum has arisen from the belief that a productive dialogue needs to be established between economic agents, actors in globalization, intellectuals and academics concerned with such phenomena, citizens' organizations and, in particular, the grass-roots organizations working in the field of human rights that experience their impact. To promote effective dialogue a forum has been established in the United Nations under the mandate of the Sub-Commission that will facilitate an exchange of views between actors who normally do not join in the same discussions: Governments, government development agencies, transnational corporations, financial institutions, United Nations specialized agencies, multilateral banks, non-governmental organizations, cooperation agencies, workers' organizations and grass-roots associations, and citizens' organizations involved in development, solidarity and the realization of economic, social and cultural rights. The participants will have an equal right to be heard, in an atmosphere of constructive dialogue and respect for ideas and opinions.

9. The aim of the Social Forum will be to discuss the most important issues affecting development in today's world, in particular those relating to globalization and its impact on people, poverty, development, cooperation and the full enjoyment of individual rights. Yet, unlike other forums for debate, it will be able to put forward policy approaches, proposals, suggestions for regulations and various other recommendations, to be considered by the Sub-Commission and brought before high-level bodies in the United Nations system (see E/CN.4/Sub.2/1997/9 and annexed tables). In this sense the aim of the Social Forum is to act as a home to intellectual innovation for the United Nations system in general and the system for the defence, promotion and protection of human rights in particular. It should offer guidance and suggest policies regarding the nature and impact of contemporary globalization processes, which are generally acknowledged to affect peoples, in particular those of third world countries and regions, unequally. These contributions, in addition to constituting a democratically adopted knowledge base, would serve as input for decision-making. The 10 members of the Sub-Commission at the Social Forum will act as spokespersons for the debate in the

Sub-Commission and other formal bodies in the international system. They will need to submit resolutions and specific proposals reflecting the debate and translating it into practical measures for the international system.

10. The Social Forum is a response to the new requirements and challenges arising as a result of the globalization of the economy, which has entered an accelerated phase in the last decade. Globalized communications and increasingly wide-ranging exchanges of goods and financial resources, but also of messages, cultural symbols, consumption patterns and ethical standards, are involving an increasing number of actors in decisions concerning development. Without prejudice to the responsibility of States for the fulfilment of economic, social and cultural rights, there are many other actors who not only hold responsibilities in this respect but who also often decide on possible solutions. The aim of the Social Forum is to bring all these actors together to discuss their responsibilities in terms of economic, social and cultural rights.

11. The aim of the Social Forum is also to arrange a meeting between different bodies where the theme of economic, social and cultural rights is currently discussed, such as the Committee on Economic, Social and Cultural Rights, which is responsible for monitoring the implementation of the Covenant, the Working Group on the Right to Development and other United Nations bodies such as the International Labour Organization (ILO), with a view to establishing links and a common meeting-place, coordination, joint projects and mutual acquaintance, subject to respect for each one's sphere of competence.

12. For its first session the Social Forum will use a simple and open discussion procedure. Panels have been organized, one each morning, with the aim of promoting discussion. Invitations to these panels have been extended to representatives of the Porto Alegre and Davos forums, internationally recognized intellectual and political figures, and to leaders of grass-roots organizations, in particular networks of production sector organizations, workers, women, craftsmen, fishermen, agricultural workers, indigenous peoples and various producers' organizations. Invitations have also been extended to representatives of the better known and more important international organizations such as the World Bank, International Monetary Fund (IMF), World Trade Organization (WTO), ILO, United Nations Food and Agriculture Organization (FAO) and others of a similar stature. Invitations have also been sent to the more important non-governmental organizations, many of which have formed a support group:

"Friends of the Social Forum", with the aim of promoting and facilitating participation by grass-roots organizations. The expectation is that these individuals and representatives will participate in a democratic manner on an equal basis.

II. TOPICS, OBJECTIVES AND AGENDA

13. The first session of the Social Forum will focus on the relationship between globalization and the attainment of human rights, particularly with regard to poverty eradication and reduction and the right to food.

14. Observers of global processes are increasingly concerned at the impact of globalization on poverty and hunger. The statistics are so depressing that they are almost devoid of impact on public opinion. Every day there is news of large numbers of extremely complex situations so that it seems that millions face a problematic fate without any apparent solution to their difficulties. The complexity of the phenomena often leads to inaction and the view that any attempt to reflect on these matters is futile. Yet entire regions of the world are without prospects for development or economic growth, or, quite simply, any possibility of survival at a basic level. The more developed countries look with concern on efforts by the impoverished masses to seek a solution to their problems in migration and are fully aware that merely closing their borders does not offer either a short-term or a long-term solution. Global economic authorities at the highest level realize that systems of cooperation for development, humanitarian assistance and, in general, transfers of resources from the first to the third world - so-called development projects - are in crisis or have simply failed. No one who closely follows the world press and the academic and political debate can have any doubt that in this area a significant and systematic effort is required to create new paradigms, new proposals, alliances and commitments. The mass demonstrations held in almost every part of the world in recent years are simply another expression of what the Sub-Commission has been pointing out for some years, before these demonstrations took place, and which justify the existence of this Social Forum.

A. The debate on economic, social and cultural rights in a global world

15. The Social Forum's main goal is the understanding of economic, social and cultural rights in a globalized world.

16. The report by the Special Rapporteur, Mr. Danilo Türk (E/CN.4/Sub.2/1992/16), drew attention to "the need for a comprehensive approach towards human rights and for strengthening economic, social and cultural rights". It added that in view of recent political and social changes, "this is precisely the time when a unified and balanced approach should be sought in the

interpretation of the relationship between the two major sets of human rights". It then goes on to quote Henkin's statement that "the International Covenant on Economic, Social and Cultural Rights is law, not merely exhortation and aspiration. The rights it recognizes are as 'human', universal and fundamental as are those of the International Covenant on Civil and Political Rights". These considerations have provided the basis for most of the studies carried out in recent years in the Sub-Commission and should guide the debates and studies of the Social Forum.

17. Economic, social and cultural rights now constitute therefore a global, valid code, solemnly approved by the States, which provides a common basis on which to build relations between the most vulnerable sectors, Governments and non-governmental actors, in the areas of commerce, industry and finance as well as in the non-governmental world of development and international solidarity. These rights should be understood as a set of principles on which to found the establishment of a system of new and better relations in the process of globalization currently occurring in the world.

18. With the globalization of markets, information systems, financial institutions and organizations wielding economic, social and cultural authority, there has been a growing globalization of political society and civil society in different forms. The terms commonly used are "globalization from above" and "globalization from below", i.e. of institutions and organizations that express civil society in all its diversity and which are also becoming increasingly globalized.[3] Understanding these phenomena should be part of the Social Forum's agenda.

19. On the day of general discussion of globalization at the eighteenth session of the Committee on Economic, Social and Cultural Rights, participants drew attention to the need for a set of regulations to mitigate the negative impact of globalization. There was a need to integrate human rights obligations in the function of international, financial and commercial institutions and to point out, call upon and demand of transnational enterprises in a particular country that they should respect human rights (see E/1999/22-E/C.12/1998/26). This concern, fully shared by many United Nations organs and other international bodies, must become one of the main objectives to be achieved by the Social Forum through the formulation of proposals which would then be studied by specialized bodies. The Social Forum should therefore be a source of information, proposals and suggestions in the area of economic, social and cultural rights.

B. Study of relations between globalized world trade, the decisions adopted by multilateral organizations and the realization of economic, social and cultural rights

20. There are increasingly close links between "globalized decisions" and the lives of individuals. Many decisions taken at global summits, meetings and assemblies affect the world as a whole through both their benefits and their negative effects on populations.

21. One of the most important issues in this new century, as may easily be seen from the succession of demonstrations taking place at global meetings, is the link between decisions taken by Governments and by multinational or multilateral organizations concerning international trade and the consequences of those decisions on countries, regions, localities and individuals. The Social Forum should provide an area for dialogue in which these key aspects of concern to the international community may be analysed.

22. Commitment 8 of the Copenhagen Word Summit for Social Development ("Social Summit") stated explicitly: "We commit ourselves to ensuring that when structural adjustment programmes are agreed to they include social development goals, in particular eradicating poverty, promoting full and productive employment, and enhancing social integration" (see A/CONF.166/L.3/Add.7). This wish expressed by the international community is clearly applicable to all decisions taken nowadays in the area of trade and finance. In the last two years the Sub-Commission has discussed the reports of Mr. Oloka Onyango and Ms. Deepika Udagama, in which this issue has been analysed in depth. The Social Forum should prepare an analysis of the various situations, proposals and suggestions for the relevant specialized agencies.

23. The Social Forum, without prejudice to the activities of other specialized agencies and taking their work into account, should analyse the effects on employment of international measures aimed at liberalizing markets, deregulating labour and altering tariffs and of demands for budget reductions by the World Bank and multilateral organizations. The study of employment should include an analysis of the consequences such measures have on women and children in particular. At the Social Forum these economic and financial analyses are not valid on their own terms, as would be the case if they were discussed at other specialized forums and meetings, but, rather, in terms of their relationship with human rights, in particular, economic, social and cultural rights.

C. Poverty and extreme poverty in a globalized world

24. The World Summit for Social Development found that the struggle against poverty and the provision of sustainable means of living constitute a moral, political and economic responsibility for national Governments and the international community.

25. The Social Forum should provide a focus for monitoring situations of poverty in the world, combining economic, commercial and financial prospects with moral and political considerations, in the light of human rights requirements. The frustration experienced by people pursuing the ideal of a fairer world and by those dealing with day-to-day economic realities should be overcome through constructive proposals. Accordingly it has been decided to focus on this topic at the first session of the Forum, without prejudice to analysis of this complex question from a broader perspective.

26. Many international bodies have found that there are economic, commercial and financial decisions that have the effect of aggravating situations of poverty, often in remote areas of the world, and in different regions. The Social Forum should provide a focus for understanding these interrelated phenomena, analysing them from several points of view and searching for solutions.

27. Rural poverty and extreme rural poverty should be an area of particular concern for the Social Forum, since, especially in the third world, it is in rural areas that the worst forms of poverty tend to be found. Accordingly the Social Forum would wish to analyse these questions in particular at this first session.

28. Urban poverty, especially in major cities, is another issue to which the Social Forum should give its closest attention. The Sub-Commission has a great deal of material produced by its special rapporteurs on the right to housing (see, for example, the final report by Mr. Rajindar Sachar (E/CN.4/Sub.2/1995/12)). The resolutions adopted by the United Nations Conference on Human Settlements (Habitat II) held in Istanbul (Turkey) in 1996 and the debates concerning the right to adequate housing should be analysed within the Forum's broader perspective, namely globalization and the right to adequate housing (see report by Commission Special Rapporteur, Mr. Kothari (E/CN.4/2001/51)).

D. The effects of international trade and finance systems and the activities of transnational corporations and multilateral financial institutions on income distribution at national and international level

29. Bad income distribution at the national and international levels is one of the worst factors for social and political destabilization and a factor for social disintegration. All studies agree that the search for the better realization of economic, social and cultural rights depends on improving standards of social equity and on the way goods and services are distributed within and among societies. There are many factors causing bad income distribution at the national and international levels. The Social Forum should provide a focus for analysing these effects and for putting forward proposals for standards, plans and programmes aimed at improving income distribution.

30. The Social Forum should coordinate and make use of the deliberations and achievements of the Sub-Commission's working group on the working methods and activities of transnational cooperations, which in recent years has made progress on many aspects related to this issue. There is no doubt whatsoever that there are enterprises, both production as well as financial companies, which have a capacity for action that exceeds that of some States and which frequently have a decisive impact on populations. The Social Forum should provide a focus for reporting on not only economic situations but also standard-setting, points of agreement, analysis of best practice and regulatory principles capable of transforming existing relationships, which are generally extremely prejudicial for poor populations.

31. The fragmentation of societies and complex processes of social disintegration are often the unforeseen consequences of economic, commercial and financial decisions. The crisis affecting many social integration systems constitutes one of the gravest dangers of conflict and violence. The Social Summit stated in commitment 4 of the Copenhagen Declaration: "We commit ourselves to promoting social integration by fostering societies that are stable, safe and just and that are based on the promotion and protection of all human rights, as well as on non-discrimination, tolerance, respect for diversity, equality of opportunity, solidarity, security, and participation of all people." The Programme of Action refers to the need for effective laws and mechanisms to achieve that objective, an issue which the Social Forum should also discuss.

32. From this perspective the Social Forum is an "early warning" centre for social and political conflicts since, as is generally recognized, many, if not most, of them originate in situations of the kind considered here. The voices of grass-roots organizations, citizens'

associations, non-governmental organizations and other actors such as intellectuals, academics and analysts, are of strategic importance in drawing attention to situations before they give rise to violent, destructive processes that cannot be halted. Discussion in a formal public forum of the United Nations system will provide an effective tool in this regard.

E. Analysis of international decisions affecting basic resources for the population, and basic social services, in particular the right to health and education

33. Many decisions taken at international level have implications for the basic resources which populations need for their survival, life and development. The control and use of natural resources is increasingly determined by decisions taken somewhere else. The Sub-Commission has been spending more time discussing the right to drinking water and the right to food, among other matters of fundamental importance. The links between the enjoyment of these rights and the economic decisions taken by public and private actors should be one of the issues taken up by the Social Forum.

34. International decisions in the globalized economy, whether private or public, often entail serious cuts in the social expenditure of individual countries. The World Summit for Social Development and many other international bodies have drawn attention to the need to ensure that the system of economic and financial decision-making should not adversely affect weak social service structures, especially in the poorest countries.

35. The analysis of social expenditure on education and health should be given consideration in the Social Forum's discussions.

F. Analysis of the consequences of decisions relating to international trade, finance and economic organization for vulnerable groups, especially minorities, indigenous peoples, migrants, refugees, women, children and other social sectors affected by such measures

36. The Sub-Commission has a special mandate to study minority groups, indigenous peoples, migrants, displaced people, women, children, refugees and other vulnerable groups. The link between global processes in the economic, trade, financial and other areas and the economic, social and cultural rights of these sectors is of the highest importance and should be included in the Social Forum's agenda.

37. Independently of what may be done or what should be done by specialized bodies (such as the Working Group on Indigenous Populations and the Permanent Forum for Indigenous Peoples on that issue), the Social Forum should provide a focus for specific discussion of the

realization of economic, social and cultural rights and the way these groups are affected, as well as of situations in which the economic, social and cultural rights of these groups are impaired by multilateral policies, the activities of transnational corporations and financial investments amongst others. The Forum should coordinate its activities with those United Nations agencies and specialized bodies.

G. Public and private, multilateral and bilateral international development cooperation and the realization of economic, social and cultural rights

38. The importance of international cooperation is another of the characteristics of the current process of globalization. State development agencies compete with public multilateral agencies and private or non-governmental organizations. In recent years, powerful organizations have emerged, which handle considerable resources. The debate about the characteristics of development aid and international cooperation and their implications for human rights and economic, social and cultural rights should be part of the Social Forum's programme.

39. This item should, at future sessions of the Social Forum, cover the international community's undertaking to devote 0.7 per cent of the gross national product of developed countries to cooperation, the so-called "20/20" initiative promises and commitments to reduce external debt and related issues.

40. The link between humanitarian aid and human rights is a highly complex issue of increasing concern to the international community. Humanitarian aid has today become a major issue, with the establishment of extensive aid networks dealing with catastrophes, natural disasters and, especially, situations of political crisis and violence. The importance of and need for this humanitarian aid at specific times, especially in response to geographical or political calamites in the third world, is clear. The relationship between such aid and its impact is, however, complex. Quite often international aid takes on a political connotation and it has sometimes been used as a means of pressure. Moreover, the manner in which international aid is applied frequently determines the subsequent development of the country or region concerned. Not infrequently short-term aid becomes permanent, thereby destroying local production and destabilizing traditional societies. These issues must be analysed in the light of human rights, and guidelines and strategies should be proposed for the benefit of the international community and the competent bodies involved.

41. The Social Forum should provide a focus for studying, proposing and putting forward innovative proposals for development cooperation and humanitarian aid and in general for efforts to improve the quantity and quality of international cooperation.

H. Follow-up to agreements in social matters reached at summits, particularly the Copenhagen World Summit for Social Development, and in other international bodies, concerning the link between economic, commercial and financial affairs and the full realization of human rights, especially economic, social and cultural rights

42. The Social Forum should provide annual follow-up to decisions taken by States at various international meetings held in recent years and at formal follow-up and evaluation meetings. Such discussions should lead to recommendations and improve the appreciation by many different actors of the consequences of such meetings.

I. Social and economic indicators, studies and research, and their role in the realization of economic, social and cultural rights

43. The debate on human rights indicators, in particular those relating to economic, social and cultural rights, has run into many difficulties. Nevertheless, many United Nations organs and bodies have made progress in this area, and have succeeded in producing their own indicators based on social policies in many parts of the world, such as the Human Development Index produced by the United Nations Development Programme.

44. The Social Forum should discuss the criteria used to construct such indicators, propose new alternatives and seek sufficient support in the specialized agencies to ensure that discussions are held on the basis of adequate data.

45. The Social Forum will have the capacity to propose studies, request third parties to undertake specific research, establish work teams and serve as a vehicle for proposals in substantive areas so as to bring about change and improved living conditions for broad segments of the world's population.

Notes

[1] Accreditation of participants will be via a formal letter from the organization or institution providing details of the representative at the Social Forum. Grounds passes for entry into the Palais des Nations at Geneva may be obtained immediately prior to the event at the accreditation office at the Villa Les Feuillantines, avenue de la Paix 13, 1211 Geneva 10, or by e-mail at www.unhchr.ch/html/menu2/2/sfmain/htm.

[2] All this material is available in various languages on the web site of the Office of the High Commissioner for Human Rights (www.unhchr.ch).

[3] The World Social Forum, held in 2001 and 2002 in Porto Alegre (Brazil) offers a good example of "globalization from below". The Forum brought together a number of global civil society networks to discuss the impact on them of globalization. The Davos World Economic Forum's Annual Meeting, held on a stopgap ad hoc basis in 2002 in New York, is a different kind of forum for debate in an informal setting between business/financial and government élites that outlines trends in globalization. It is the intention of the Social Forum for the achievements and experience of these meetings to be discussed and publicized as they bring together highly important social actors that frequently have no contact.

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ADMINISTRATION OF JUSTICE

Issue of the administration of justice through military tribunals

**Report submitted by Mr. Louis Joinet pursuant to
Sub-Commission decision 2001/103* ****

* The summary of this report is circulated in all official languages. The body of the report is annexed as is, in the original language and English only.

** For reasons beyond the control of the Special Rapporteur, the report was submitted after the deadline established by the General Assembly.

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Executive summary

In its decision 2001/103, the Sub-Commission on the Promotion and Protection of Human Rights, taking into account the recommendation made by the sessional working group on the administration of justice (E/CN.4/Sub.2/2001/7, para. 39), decided, without a vote, to request Mr. Louis Joinet to update, without financial implications, his interim report on the evolution of the administration of justice through military tribunals (E/CN.4/Sub.2/2001/WG.1/CRP.3), taking into account the comments made by the participants at the fifty-third session, and to submit the updated version of his report to the Sub-Commission at its fifty-fourth session. The aim of this document is to consider the administration of justice through military tribunals on the basis of the findings and subsequent analyses relating to the questionnaire prepared by Mr. Joinet (E/CN.4/Sub.2/2001/WG.1/CRP.3, annex).

Trial of civilians by military tribunals

Three scenarios will be considered:

(a) Trial of civilians who have ties to the military (camp followers and civil servants working in the army). This category will be considered in the second part of the report, which deals with judicial guarantees for military personnel and persons assimilated thereto.

(b) Trial of civilians for offences committed together with members of the armed forces. This scenario comprises four distinct situations: the offence is of a strictly military nature (in this case, civilians are most often charged as accomplices); the offence is not of a strictly military nature and involves common law offences; the place where the offence was committed is under the territorial jurisdiction of military tribunals; or the victim is a member of the armed forces (passive personal competence of military tribunals).

(c) Trial of civilians who have no functional ties to the military and who do not fall within the second scenario but who are subject to the jurisdiction of military tribunals. It is important to make the following distinctions: the victim of the offence is a member of the armed forces (passive personal competence of military tribunals); the offence involves military property or a military facility; the place where the offence was committed is a military or other area that is under the jurisdiction of military tribunals (territorial jurisdiction of military tribunals). However, the most frequent scenario is the assignment to military tribunals of jurisdiction over civilians for common law offences, particularly for political or similar offences (rebellion, sedition and so on).

International reference standards of relevance to the study

1. Covered by treaties

The provisions on the right to a fair trial and judicial guarantees contained in the International Covenant on Civil and Political Rights (art. 14), the American Convention on Human Rights (art. 8), the European Convention on Human Rights (art. 6) and the African Charter on Human and Peoples' Rights (art. 7) do not make explicit reference to military tribunals. Nevertheless, treaty bodies have developed a restrictive interpretation in this area.

2. Not covered by treaties

In addition to the Universal Declaration on the Independence of Justice, adopted in Quebec, Canada, in June 1983, and the Basic Principles on the Independence of the Judiciary, adopted in Milan, Italy, in September 1985, which provides that "everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures" (para. 5), particular consideration should be given to Commission on Human Rights resolution 2002/37, entitled "Integrity of the judicial system", which "also reiterates that everyone has the right to be tried by ordinary courts or tribunals using duly established legal procedures and that tribunals that do not use such procedures should not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals" (para. 2).

Case law of treaty bodies

Initially, the Human Rights Committee did not consider that the trial of civilians by military courts was, per se, incompatible with the International Covenant on Civil and Political Rights, provided that the jurisdiction of such courts was in keeping with the provisions of article 14 of the Covenant (General Comment No. 13, para. 4). However, the Committee gradually came to criticize such tribunals during its consideration of periodic reports concerning Algeria, Colombia, Morocco, the Republic of Korea and Venezuela. The Committee subsequently made it increasingly clear that it was in favour of limiting the jurisdiction of military tribunals in the cases of Cameroon, Chile, Egypt, Kuwait, Lebanon, Poland, the Russian Federation, Slovakia, the Syrian Arab Republic and Uzbekistan, and particularly Peru, considering, in the light of its General Comment No. 13, that the trial of civilians by military tribunals was incompatible with the administration of fair, impartial and independent justice.

The same change in position can be seen in the concluding observations of the Committee against Torture (Egypt and Peru), the Committee on the Rights of the Child (Peru, Democratic Republic of the Congo and Turkey) and the Committee on the Elimination of Racial Discrimination (Nigeria).

Mechanisms of the Commission on Human Rights

There is a growing consensus on the need to limit the role of military tribunals, or even abolish them. In this regard, attention is drawn to the positions of the Special Rapporteur on the independence of judges and lawyers, the Working Group on Arbitrary Detention, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Representative of the Commission on Human Rights to monitor the situation of human rights in Equatorial Guinea.

National standards

More and more constitutions and fundamental laws strictly limit the jurisdiction of military tribunals - Germany (art. 96), Greece (art. 96.4), Guatemala (art. 209), Haiti (arts. 42 and 267.3), Honduras (art. 90), Italy (art. 103), Mexico (art. 13), Nicaragua (art. 93), Paraguay (art. 174), Venezuela (art. 49) - or even abolish them in peacetime (Austria, Denmark, France, Guinea, Norway and Sweden).

Trial, by military tribunals, of military personnel accused of serious human rights violations

The trial, by military tribunals, of members of the armed forces or the police accused of serious human rights violations that constitute crimes is a current practice in many countries. It is frequently a source of impunity. This practice tests the effectiveness of the right to effective remedy (article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights), of the right to a fair hearing by an independent and impartial tribunal (article 14, paragraph 1, of the Covenant) and of the right to equal protection of the law (article 26 of the Covenant).

International reference standards of relevance to the study

1. Covered by treaties

The Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly in its resolution 47/133 of 18 December 1992, provides that persons presumed responsible for enforced disappearances "shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts" (art. 16, para. 2). Article IX of the Inter-American Convention on Forced Disappearance of Persons contains a similar provision.

2. Not covered by treaties

The Universal Declaration on the Independence of Justice provides that "the jurisdiction of military tribunals shall be confined to military offences committed by military personnel. There shall always be a right of appeal from such tribunals to a legally qualified appellate court" (art. 2.06 (e)). In this regard, attention is drawn to two draft standards: the set of principles for the protection and promotion of human rights through action to combat impunity (principle 31 on restrictions on the jurisdiction of military courts) [see E/CN.4/Sub.2/1997/20/Rev. 1, annex II] and the basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights and international humanitarian law (principle 25) [see E/CN.4/1997/104, appendix]. One should also bear in mind Commission resolution 1994/67, entitled "Civil defence forces", and Sub-Commission resolutions dealing with the same subject, particularly resolution 1998/3, which urges States to ensure that inquiries into murders of human rights defenders, as well as any related proceedings, are conducted by civil tribunals.

Case law of treaty bodies

In its consideration of periodic reports, the Human Rights Committee has gradually come to the conclusion that military courts should not be competent to try serious human rights violations committed by members of the armed forces (or the police), and that such acts should be investigated and prosecuted by the ordinary courts (Bolivia, Brazil, Chile, Colombia, Croatia, Dominican Republic, Ecuador, Egypt, El Salvador, Guatemala, Guinea, Lebanon, Peru and Venezuela). The same approach is to be found in the concluding observations of the Committee against Torture (Colombia, Guatemala, Jordan, Peru, Portugal and Venezuela) and the Committee on the Rights of the Child (Colombia).

Mechanisms of the Commission on Human Rights

There is also a growing consensus on the need to exclude serious human rights violations committed by members of the armed forces (or the police) from the jurisdiction of military tribunals, and not to consider extrajudicial executions, torture and enforced disappearances as military offences or acts performed in the line of duty. This is the position of the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on torture, the Special Rapporteur on the independence of judges and lawyers, the Working Group on Enforced or Involuntary Disappearances, the Working Group on Arbitrary Detention, the Special Representative of the Secretary-General on the situation of human rights defenders, the Special Representative of the Secretary-General for El Salvador, and of the independent experts on the situation of human rights in Guatemala and Somalia, and the Special Representative of the Commission on Human Rights to monitor the situation of human rights in Equatorial Guinea.

National standards

More and more countries are adopting legislation that excludes the jurisdiction of military tribunals over serious human rights violations committed by members of the armed forces (or the police). In some countries, the constitution and the fundamental law provide that only civil courts are competent to try military personnel responsible for human rights violations, as is the case in Bolivia (art. 34), Haiti (art. 42.3) and Venezuela (art. 29). In other countries, this exclusion is made under ordinary or military penal law: in Colombia (Military Penal Code and the Act on Genocide, Enforced Disappearance, Torture and Illicit Displacement of Populations), in Guatemala (Decree No. 41 of 1996) and in Nicaragua.

Annex

ADMINISTRATION OF JUSTICE

Issue of the administration of justice through military tribunals

Report submitted by Mr. Louis Joinet pursuant to Sub-Commission decision 2001/103

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Introduction

1. Since the 1960s, the Sub-Commission has played a pioneering role in drawing the attention of the Commission on Human Rights to the risks of human rights violations arising when the justice is administered by military tribunals. The Sub-Commission has considered three themes, which have taken the form of studies on:

(a) Equality in the administration of justice (see the report submitted in 1969 by Mr. Rannat: E/CN.4/Sub.2/296/Rev.1);

(b) Implications for human rights of situations known as states of siege or emergency (see the report of Ms. Questiaux: E/CN.4/Sub.2/1982/15);

(c) Human rights and states of emergency (see the document prepared by Mr. Despouy: E/CN.4/Sub.2/1985/19).

2. In paragraph 140 of his study of equality in the administration of justice, Mr. Rannat noted that risks of violations arise "when military courts are given jurisdiction over civilians", which led him to wonder whether members of the armed forces are not tried, in many cases, if not in most judicial systems, in accordance with inferior forms of procedure. These are the two main themes of this study.

3. The desire to have specific laws and special jurisdictions for military personnel goes back to ancient times, when there was total confusion between the act of commanding and that of judging, which was denounced in Cicero's famous *Cedant arma togae*. The tendency to favour specific jurisdictions separate from the act of commanding began only in the third century.[1] This separation became the rule throughout the era of so-called "conventional" wars, that is, wars fought by regular armies. In this context, each military jurisdiction tried only its own personnel. It was essentially owing to the influence of colonial wars and, later, wars of independence associated, in Africa and Asia, with decolonization, and the proliferation of dictatorships under military influence in Latin America, that military justice gradually broadened its jurisdiction, trying not only its own soldiers but also combatants of the opposing side - who were called "rebels", "guerrillas", "freedom fighters" or other names - in order to emphasize that the persons involved were, if not "civilians", at least "non-military personnel". The consequences of these periods were numerous domestic conflicts of ideological, ethnic, religious or other origin.

4 During these last two phases, military justice was subjected to increasing criticism, with the recurrence of two major grievances:

(a) Its tendency to reinforce the impunity of military personnel, particularly high-ranking officers, responsible for human rights violations constituting serious crimes under international law (war crimes, crimes against humanity, or even genocide);

(b) Its tendency to broaden its jurisdiction with respect to peaceful civil society*.

I. TYPOLOGY OF THE COMPETENCE OF MILITARY TRIBUNALS AND ITS EVOLUTION

A. Trial of civilians by military tribunals

5. Three scenarios will be considered:

(a) Trial of civilians who have ties to the military (camp followers and civil servants working in the army);

(b) Trial of civilians for offences jointly committed by civilians and members of the armed forces. This scenario comprises four distinct situations: the offence is of a strictly military nature (in this case, civilians are generally prosecuted as accomplices); the offence is not of a strictly military nature and involves common law offences; the place where the offence was committed is under the territorial jurisdiction of military tribunals; or the victim is a member of the armed forces (passive personal competence of military tribunals);

(c) Trial of civilians who have no functional ties to the military and who do not fall within the second scenario but who are subject to military tribunals in the following situations: the victim of the offence is a member of the armed forces (passive personal competence of military tribunals); the offences involves military property or a military facility; or the place where the offence was committed is a military area (territorial jurisdiction of military tribunals).

These are the criteria for jurisdiction that are traditionally applied by countries that have military tribunals, particularly in peacetime.

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* Restrictions on the length of reports (maximum of 20 pages) has prevented the inclusion of three other issues that are closely related to the subject of this study, namely:

(a) Typology of the role and composition of the prosecution in the administration of military justice and its evolution;

(b) The administration of justice by courts of special jurisdiction other than military tribunals;

(c) Administration of justice during peacekeeping or peace-building operations conducted by armed forces under a mandate.

It is for the Sub-Commission to decide on how these aspects of the study are to be followed up. The study could make use of this report as a basic document for the expert seminar suggested when Mr. Joinet submitted his interim report to the Sub-Commission at its fifty-third session (E/CN.4/Sub.2/2001/WG.1/CRP.3; proposal 1, p.10) and which has to date not been held owing to insufficient resources.

6. Experience shows that the broad interpretation of the various criteria for jurisdiction, particularly when a state of war or emergency is declared, extends the jurisdiction of military tribunals. In this situation, their activities consist less and less of trying military personnel and more and more of initially trying armed opponents and then gradually civilians who demonstrate their opposition by peacefully exercising the rights recognized and guaranteed by international standards and procedures, particularly in the areas of freedom of expression, association and demonstration.

1. International reference standards of relevance to the study

(a) Covered by treaties

7. These include the provisions on the right to a fair trial and judicial guarantees contained in the International Covenant on Civil and Political Rights of 16 December 1966 (hereinafter referred to as "the Covenant") [art. 14], the American Convention on Human Rights of 22 November 1969 (art. 8), the European Convention on Human Rights of 4 November 1950 (art. 6), and the African Charter on Human and Peoples' Rights of 27 June 1981 (art. 7). It should be noted that, while these instruments do not make explicit reference to military tribunals, treaty bodies have gradually developed a restrictive interpretation of their jurisdiction.

(b) Not covered by treaties

8. The issue of the administration of justice through military tribunals is, however, explicitly addressed by certain standards of a non-treaty nature. Article 5 of the draft declaration on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, referred to as the "Singhvi declaration" (E/CN.4/Sub.2/1988/20/Add.1 and Add.1/Corr.1), provides that the jurisdiction of military tribunals should be confined exclusively to "military offences". Article 5 reads as follows:

> "[...]
>
> "(b) No ad hoc tribunals shall be established to displace jurisdiction properly vested in the courts;
>
> "[...]
>
> "(e) In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts [...];
>
> "(f) The jurisdiction of military tribunals shall be confined to military offences. There shall always be a right of appeal from such tribunals to a legally qualified appellate court or tribunal or a remedy by way of an application for annulment;
>
> "[...]."

Although the Singhvi declaration has not been adopted by the Commission on Human Rights, the Commission, in its resolution 1989/32 of 6 March 1989, "invites Governments to take into account the principles set forth in the draft declaration".

9. Paragraph 5 of the Basic Principles on the Independence of the Judiciary, adopted at Milan, Italy, in September 1985, provides that "everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures".

10. On 22 April 2002, the Commission on Human Rights adopted resolution 2002/37, entitled "Integrity of the judicial system". In this particularly important resolution, the Commission:

> "[...]
>
> "1. *Reiterates* that every person is entitled, in full equality, to a fair and public hearing by a competent, independent and impartial tribunal, in the determination of his/her rights and obligations and of any criminal charge against him/her;
>
> "2. *Also reiterates* that everyone has the right to be tried by ordinary courts or tribunals using duly established legal procedures and that tribunals that do not use such procedures should not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals;
>
> "[...]
>
> "5. *Underlines* that any court trying a person charged with a criminal offence must be based on the principles of independence and impartiality;
>
> "[...]
>
> "8. *Calls upon* States that have military courts for trying criminal offenders to ensure that such courts are an integral part of the general judicial system and use the duly established legal proceedings;
>
> "[...]."

11. The World Conference on the Independence of Justice, held in Montreal, Canada, in June 1983, adopted the Universal Declaration on the Independence of Justice (E/CN.4/Sub.2/1985/18/Add.6, annex IV), paragraph 2.06 (e) of which provides that:

> "The jurisdiction of military tribunals shall be confined to military offences committed by military personnel. There shall always be a right of appeal from such tribunals to a legally qualified appellate court."

2. Case law of treaty bodies

12. Initially, the Human Rights Committee did not consider that the trial of civilians by military courts was, per se, incompatible with the Covenant, provided that the jurisdiction of such courts was in keeping with the provisions of article 14 of the Covenant (General Comment No. 13, para. 4). However, the Committee gradually began to take a more critical approach during its consideration of the periodic reports submitted by Algeria,[2] Colombia,[3] Morocco,[4] the Republic of Korea[5] and Venezuela[6]. The Committee subsequently made it increasingly clear that it was in favour of limiting the jurisdiction of military tribunals in its consideration of reports submitted by Chile,[7] Egypt,[8] Kuwait,[9] Lebanon,[10] Poland,[11] the Russian Federation,[12] Slovakia,[13] the Syrian Arab Republic[14] and Uzbekistan,[15] and particularly Peru.[16] In the light of its General Comment No. 13, the Committee considered that the trial of civilians by military tribunals was irreconcilable with the administration of fair, impartial and independent justice. Even more explicitly, it noted that, in the aforementioned cases of Chile, Kuwait and the Syrian Arab Republic, the trial of civilians by military tribunals was incompatible with article 14 of the Covenant. The Committee therefore repeatedly recommended that States amend their legislation to ensure that civilians were tried only by civil courts. The same change in position can also be seen in the concluding observations of the Committee against Torture (Egypt[17] and Peru[18]), the Committee on the Rights of the Child (Peru,[19] Democratic Republic of the Congo[20] and Turkey[21]) and the Committee on the Elimination of Racial Discrimination (Nigeria[22]).

3. Position of the mechanisms of the Commission on Human Rights

13. There is a growing consensus on the need to limit the role of military jurisdictions, or even abolish them. In this regard, the following positions should be considered. The Special Rapporteur on the independence of judges and lawyers considered that, "in regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice".[23] For its part, the Working Group on Arbitrary Detention is of the opinion that, "if some form of military justice is to continue to exist, it should observe four rules: (a) it should be incompetent to try civilians; (b) it should be incompetent to try military personnel if the victims include civilians; (c) it should be incompetent to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardizes or involves risk of jeopardizing a democratic regime; and (d) it should be prohibited imposing the death penalty under any circumstances".[24] In his report on his mission to Peru in 1993, the Special Rapporteur on extrajudicial, summary or arbitrary executions considered that the trial of civilians by military courts were "restrictions of fair trial guarantees".[25] The Special Representative of the Commission on Human Rights to monitor the situation of human rights in Equatorial Guinea recommended on a number of occasions that the authorities of that country should amend its legislation in order to ensure that military tribunals were no longer competent to try civilians.

4. Case law of the regional courts

The European Court of Human Rights

14. The European Court of Human Rights ruled (case *Incal v. Turkey*) that "the presence of a military judge in the State Security Court was contrary to the principles of independence and

impartiality, which are essential prerequisites for a fair trial".[26] In the case *Findlay v. the United Kingdom*, the Court considered that the court martial that had tried the applicant had been neither independent nor impartial because its members had been subordinate to the officer who served as the prosecuting authority and the sentence could be altered by that officer.[27] Following that judgement, the United Kingdom amended its legislation on the subject (see below, chap. II, para. B).

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights

15. The Inter-American Court of Human Rights, in a case relating to civilians tried for acts of terrorism by a military tribunal, considered that the trial of civilians by a military tribunal was contrary to the right to a fair and just trial and the principle of the "natural judge".[28] For its part, the Inter-American Commission on Human Rights has always considered that military tribunals do not meet the conditions of independence and impartiality required by the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man.[29] For example, it considered that a special military court was not an independent and impartial tribunal because it was subordinate to the Ministry of Defence and, therefore, to the executive.[30] It also considered that the trial of civilians, particularly for political offences, by military tribunals violated the right to an independent and impartial tribunal.[31] Recently, in its resolution entitled "Terrorism and human rights" of 12 December 2001, the Inter-American Commission affirmed that "military courts may not try civilians, except when no civilian courts exist or where trial by such courts is materially impossible. Even under such circumstances, the Commission has pointed out that the trial must respect the minimum guarantees established under international law, which include non-discrimination between citizens, [...], the right to an impartial judge, respect for the rights of the defence, particularly the right to be assisted by freely chosen counsel, and access by defendants to evidence brought against them with the opportunity to contest it".[32]

5. Evolution of national standards

16. More and more constitutions and fundamental laws strictly limit the military jurisdictions [Colombia (art. 213), Greece (art. 96.4), Guatemala (art. 209), Haiti (arts. 42 and 267.3), Honduras (art. 90), Italy (art. 103), Mexico (art. 13), Nicaragua (art. 93), Paraguay (art. 174) and Venezuela (art. 49)] or even abolish them in peacetime (Austria, Denmark, France, Germany, Norway and Sweden).

B. Trial, by military tribunals, of military personnel accused of serious human rights violations

17. In many countries, military personnel accused of serious human rights violations continue to be tried by military tribunals. This practice, which is one of the main causes of impunity, tends to violate the right, guaranteed by the Covenant, of every person to effective remedy (art. 2, para. 3 (a)), to a fair hearing by an independent and impartial tribunal (art. 14, para. 1) and to the protection of the law (art. 26). In this regard, in a highly publicized

precedent-setting decision, handed down on 29 March 2001, the High Court of South Africa declared that the act establishing military courts was incompatible with the new Constitution. The High Court took a position that left no room for ambiguity.[33]

International reference standards of relevance to the study

(a) Covered by treaties

18. The Inter-American Convention on Forced Disappearance of Persons contains a provision (art. IX) according to which the perpetrators of forced disappearances "may be tried only in the competent jurisdictions of ordinary law in each State, to the exclusion of all other special jurisdictions, particularly military jurisdictions".

(b) Not covered by treaties

19. The Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly in its resolution 47/133 of 18 December 1992 contains a similar provision (art. 16, para. 2), as does the Universal Declaration on the Independence of Justice (see above, para. 11).

20. Other indications of such trends are two standards, currently in the drafting process, which deal explicitly with the problem of military tribunals and human rights violations. The two standards are: the set of principles for the promotion and protection of human rights through action to combat impunity (principle 31) [see E/CN.4/Sub.2/1997/20/Rev.1, annex II] and the basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights and international humanitarian law (principle 25) [see E/CN.4/1997/104, appendix]. It should also be noted that, in its resolution 1994/67, entitled "Civil defence forces", the Commission on Human Rights states that "offences involving human rights violations by such forces shall be subject to the jurisdiction of the civilian courts". The Sub-Commission has urged States to ensure that inquiries into murders of human rights defenders, as well as any related proceedings, are conducted by civil tribunals (see, in particular, Sub-Commission resolution 1998/3).

2. Case law of treaty bodies

21. In its consideration of the periodic reports of certain countries (Bolivia, Brazil, Chile, Colombia, Croatia, Dominican Republic, Ecuador, Egypt, El Salvador, Guatemala, Guinea, Lebanon, Peru and Venezuela), the Human Rights Committee has gradually come to the conclusion that military tribunals should not be competent to try serious human rights violations committed by members of the armed forces or the police, and that such acts should be investigated and prosecuted by the ordinary courts. The same approach is to be found in the concluding observations of the Committee against Torture (Colombia, Guatemala, Jordan, Peru, Portugal and Venezuela) and the Committee on the Rights of the Child (Colombia).

3. Position of the mechanisms of the Commission on Human Rights

22. There is also a growing consensus on the need to exclude serious human rights violations committed by members of the armed forces or the police from the jurisdiction of military tribunals, and not to consider extrajudicial executions, torture and enforced disappearances as military offences or acts performed in the line of duty. This is the position of the persons responsible for the following special procedures: the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on torture, the Special Rapporteur on the independence of judges and lawyers, the Special Representative of the Secretary-General for El Salvador, the Working Group on Enforced or Involuntary Disappearances, the Working Group on Arbitrary Detention, the Special Representative of the Secretary-General on the situation of human rights defenders, the Special Representative of the Commission on Human Rights to monitor the situation of human rights in Equatorial Guinea, and the independent experts on the situation of human rights in Guatemala and Somalia.

4. Evolution of national standards

23. More and more countries are adopting legislation that excludes the jurisdiction of military tribunals over serious human rights violations committed by members of the armed forces or the police. In some countries, the constitution and the fundamental law provide that only civil courts are competent to try military personnel responsible for human rights violations: Bolivia (art. 34), Haiti (art. 42.3) and Venezuela (art. 29). In other countries, this exclusion is made under ordinary or military penal law: Colombia (Military Penal Code and the Act on Genocide, Enforced Disappearance, Torture and Illicit Displacement of Populations), Guatemala (Decree No. 41 of 1996) and Nicaragua.

II. TYPOLOGY OF THE COMPOSITION OF MILITARY TRIBUNALS AND ITS EVOLUTION

24. The study of developments in this field was based on a comparative analysis conducted with reference to the questionnaire annexed to the interim report submitted by Mr. Joinet to the Sub-Commission at its fifty-third session (E/CN.4/Sub.2/2001/WG.1/CRP.3), taking a sample of European countries (France, Germany, Italy, Spain, Switzerland and the United Kingdom) that have recently carried out reforms in this area.

A. Predominantly military jurisdictions

25. Such is the case of Switzerland, whose three degrees of jurisdiction (identical in peacetime and wartime) are composed of military personnel (first instance, appeal and cassation). It should, however, be stressed that these tribunals are "quasi-civil" since the Swiss army is composed almost exclusively of civilians who perform their military service in several stages. On the other hand, the president and members of the military court of cassation are not appointed by the Minister of Defence but are elected to a four-year term by the Federal Assembly. In Spain, the military courts, which are identical in peacetime and wartime, are composed of military personnel appointed by the Minister of Defence. Since 1987, the jurisdiction of the last degree has been the Military Chamber of the Supreme Court, composed of four civilian judges (including the president) and four military judges who, in order

to ensure their independence, are given legal status similar to that of retirement and can no longer be reinstated in the armed forces. In Italy, where jurisdictions in peacetime and wartime are not the same, the dominant position of the military persists except at the highest level since, in 1987, a reform abolished the review of legality by the supreme military tribunal and gave competence to the Court of Cassation.

B. Jurisdictions tending towards a mixed composition of civilians and military personnel

26. Such is the case in the United Kingdom, whose military courts (except in emergency situations) is identical in peacetime and wartime. Each of the three branches of the armed forces (air, land and sea) has its own first-degree military jurisdictions. The jurisdictions, which are not permanent, are composed of military personnel assisted, as an *amicus curiae*, by a civilian judge who does not participate in the deliberations. On the other hand, since the entry into force, on 2 October 2000, of the Armed Forces Disciplinary Act, the aim of which was to take account of the European Convention on Human Rights, military justice is handed down, beginning with the second degree, by professional judges from ordinary jurisdictions, the supreme competent jurisdiction being the House of Lords.

C. Predominantly civil jurisdictions

27. In France, since the abolition, in 1982, of military tribunals in peacetime, infractions of military laws, including common law offences committed by military personnel in the line of duty, fall within the competence of the ordinary criminal courts composed exclusively of civilian judges. Review of legality is ensured by the Court of Cassation, as for all of the country's other jurisdictions. Military jurisdiction exists only for military personnel serving abroad and in time of war. The same trend is to be noted in Germany, where persons who commit military offences are tried, in peacetime, by the ordinary criminal courts. Constitutional review is carried out by the Federal Court of Justice and no longer by the Supreme Military Court. Thus, military penal tribunals exist only in time of war, and it should be stressed that their decisions also remain subject to review by the Federal Court of Justice, which is composed of civilian judges.

III. CONCLUSIONS

28. The study demonstrates that the administration of justice by military tribunals is being gradually "demilitarized". This is taking the form of increasing restrictions on the jurisdiction of such tribunals and changes in their composition. The most frequently encountered stages in this process are, successively:

(a) Inclusion of judges in the composition of military jurisdictions;

(b) Increasing use (in some cases, exclusive use) of civilian lawyers;

(c) Transfer of appeals to the ordinary courts, particularly appeals regarding legality, which is increasingly ensured by the ordinary supreme courts;

(d) Abolition of military tribunals in peacetime;

(e) Strengthening of guarantees of the right to a fair trial by military tribunals in time of war;

(f) Increasing limitation of trials, by military tribunals, of members of the armed forces accused of serious human rights violations, particularly when such violations constitute serious crimes under international law. This is made possible either by assigning competence to the ordinary national courts or by establishing international ad hoc criminal tribunals (and, soon, the International Criminal Court), courts which unlike their predecessors, the Nuremberg International Military Tribunal and the Tokyo Tribunal, do not have any attributes of military tribunals.

The study has shown that most of these changes have been greatly facilitated by reference to the relevant international standards, particularly under the influence of the *lato sensu* case law of the mechanisms and special procedures examined above.

IV. RECOMMENDATIONS

29. The above-mentioned developments lead me to propose the following recommendations. If the long-term objective is to abolish military tribunals and, as a first measure, military tribunals that are competent in peacetime, by transferring their cases to the ordinary courts, the recommendations that follow tend, for the time being, to improve procedural due process and the rules governing the competence of such jurisdictions. These improvements can be taken into consideration regardless of the typological composition or the competence of the military tribunals concerned.

RECOMMENDATION No. 1:
Trial of persons accused of serious human rights violations

30. In all circumstances, the competence of military tribunals should be abolished in favour of those of the ordinary courts, for trying persons responsible for serious human rights violations, such as extrajudicial executions, enforced disappearances, torture and so on.

RECOMMENDATION No. 2:
Limitations on military secrecy

31. Too often, the regulations that make it possible to invoke the secrecy of military information are diverted from their original purpose and are used to impede the course of justice. Military secrecy is certainly justifiable when it is necessary to protect the secrecy of information that may be of interest to foreign intelligence services. It should, however, be dispensed with where measures involving deprivation of liberty are concerned; under no circumstances should such measures be kept secret. From this point of view, the right to petition for a writ of habeas corpus or a remedy of amparo should be considered as a personal right, the guarantee of which should, in all circumstances, fall within the exclusive competence of the ordinary courts.

Military secrecy should therefore not be invoked when such a petition is made, either in peacetime or wartime. As another consequence of this non-invocability of military secrecy, the judge must be able to have access to the place where the detainee is being held, and there should be no possibility of invoking military secrecy on the grounds that military facilities are concerned.

RECOMMENDATION No. 3:
Publicity hearings must be the rule, not the exception

32. Another limitation that is required to lift the atmosphere of secrecy that too often shrouds the workings of the military justice system is that public hearings must be the rule, and in camera sessions should be held on an exceptional basis and be authorized by a specific, well-grounded decision the legality of which is subject to review.

RECOMMENDATION No. 4:
Access of victims to proceedings

33. In many countries, the victim is excluded from the investigation and hearings when a military jurisdiction is competent. This is a blatant case of inequality before the law. It should be abolished or, pending this, strictly limited. The presence of the victim should be compulsory, or the victim should be represented whenever he or she so requests, at the very least during the hearings, with prior access to all the evidence of the case.

RECOMMENDATION No. 5:
Strengthening of the rights to defence, particularly through the abolition of military lawyers

34. Since respect for the right to defence plays a crucial role in preventing human rights violations, the practice of providing legal assistance by recourse to military lawyers, particularly when they are appointed by the court, gives rise to doubts, perhaps unjustified, about the effectiveness of the guarantees that they can offer, if only because of the so-called theory of "appearances". From this point of view, the presence of military lawyers seems more open to criticism than that of military judges since it obviously damages the credibility of these jurisdictions. The post of military lawyer should therefore be abolished.

RECOMMENDATION No. 6:
Recourse procedures in the ordinary courts

35. In all cases where military tribunals exist, their competence should be limited to the first degree of jurisdiction. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts. In all situations, disputes concerning legality should be ensured by the supreme civil courts, in keeping with the developments that have been noted. Such recourse procedures should also be available to the victims, which presupposes that the victims are allowed to participate in the proceedings (see above, paragraph 27), particularly during the trial stage.

RECOMMENDATION No. 7:
Strict interpretation of the so-called principle of "due obedience"

36. Since the military is by nature rigidly hierarchized, the principle of due obedience, often invoked in courts and tribunals, particularly military tribunals, should in all cases be reviewed by the supreme civil courts, and should be subject to the following limitations:

(a) On the one hand, the fact that the person allegedly responsible for a violation acted on the order of a superior should not exonerate him from his criminal liability. At most, this circumstance could be considered as grounds, not for "extenuating circumstances", but for a reduced sentence;

(b) On the other hand, violations committed by a subordinate do not exonerate his hierarchical superiors from their criminal liability if they knew or had reasons to know that their subordinate committed, or was about to commit, serious violations, and if they took no measures within their power to prevent such violations or subdue their perpetrator.

RECOMMENDATION No. 8:
Abolition of the competence of military tribunals to try children and minors under the age of 18

37. This concerns either child soldiers (see the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: E/CN.4/2002/74, paragraph 108), children who are members of armed opposition groups (see the report of the Special Representative of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina and the Federal Republic of Yugoslavia: E/CN.4/2002/41) or, lastly, children who have the legal status of civilians (see the report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967: E/CN.4/2002/32; and the report of the Special Representative of the Commission to monitor the human rights situation in Equatorial Guinea: E/CN.4/2002/40). Minors, who fall within the category of vulnerable persons, should be prosecuted and tried with strict respect for the guarantees provided by the Convention on the Rights of the Child and by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) [see General Assembly resolution 40/33 of 29 November 1985, annex]. They should not, therefore, be subject to the competence of military tribunals.

RECOMMENDATION No. 9:
Abolition of the death penalty and, as a transitional measure, suspension of its execution

38. The trend in favour of the gradual abolition of capital punishment should be extended, in all circumstances, to military courts, especially since such courts provide fewer guarantees than those of ordinary courts when, by nature, judicial error is, in this instance, irreversible. As a transitional measure, the execution of the death penalty should be suspended, particularly with respect to vulnerable persons, which includes minors.

Notes

[1] See the records of the seminar entitled "Penal law and defence", held in Paris on 27 and 28 March 2001 by the Ministry of Defence, particularly the intervention of Ms. S. Apik concerning "The history of military justice", available on the Internet at web site www.defense.gouv.fr.

[2] CCPR/C/79/Add.1, para. 5 (25 September 1992).

[3] CCPR/C/79/Add.2, para. 5 (25 September 1992).

[4] A/47/40, para. 58 (23 October 1991).

[5] A/47/40, paras. 482 and 497 (15 July 1992).

[6] CCPR/C/79/Add.13, para. 8 (28 December 1992).

[7] CCPR/C/79/Add.104, para. 9 (30 March 1999).

[8] CCPR/C/79/Add.23, para. 9 (9 August 1993).

[9] CCPR/CO/69/KWT, para. 10 (27 July 2000).

[10] CCPR/C/79/Add.78, para. 14 (5 May 1997).

[11] CCPR/C/79/Add.110, para. 21 (29 July 1999).

[12] CCPR/C/79/Add.54, para. 25 (26 July 1995).

[13] CCPR/C/79/Add.79, para. 20 (4 August 1997).

[14] CCPR/CO/71/SYR and Add.1, para. 17 (24 April 2001 and 28 May 2002).

[15] CCPR/CO/71/UZB, para. 15 (26 April 2001).

[16] CCPR/C/79/Add. 67, para. 12 (25 July 1996).

[17] A/49/44, para. 88 (1994).

[18] A/55/44, para. 62 (1999).

[19] CRC/C/15/Add.120, para. 11 (22 February 2000).

[20] CRC/C/15/Add.153, para. 74 (9 July 2001).

[21] CRC/C/15/Add.152, para. 65 (9 July 2001).

[22] A/48/18, para. 313 (15 September 1993).

[23] E/CN.4/1998/39/Add.1, para. 78 (19 February 1998).

[24] E/CN.4/1999/63, para. 80 (18 December 1998).

[25] E/CN.4/1994/7/Add.2, para. 98 (15 November 1993).

[26] Quoted in Opinion No. 35/1999 (Turkey) of the Working Group on Arbitrary Detention concerning the Abdullah Öcalan case [E/CN.4/2001/14/Add.1, para. 5 (f) (9 November 2000)].

[27] European Court of Human Rights, 1997.I, vol. 30, *judgement of 25 February 1997* (Registry of the Court, Council of Europe, Strasbourg, 1997), paras. 74-77.

[28] Judgement of 30 May 1999, *Castrillo Petruzzi et al. v. Peru*. See also the judgement of 17 September 1997, *Loayza v. Peru*, Series C, No. 33, para. 61.

[29] Quoted in E/CN.4/Sub.2/1992/Add.2, para. 103.

[30] See the annual report of the Inter-American Commission on Human Rights for 1994 (OAS/Ser.L/V/II.88, doc. 9 rev., 1995).

[31] See the reports of the Inter-American Commission on Human Rights on the situation of human rights in Nicaragua (OAS/Ser.L/V/II.53, doc. 25, 1981, paras. 18 ff.; in Colombia (OAS/Ser.L/II.106, doc. 59 rev., 2000, paras. 210 ff.; in Guatemala (OAS/Ser.L/V/II.61, doc. 47, 1983, paras. 31 ff.; in Chile (OAS/Ser.L/V/II.66, doc. 17, 1985); in Uruguay (OAS/Ser.L/V/II.43, doc. 10, corr.1, 1978, chap. VI); and in Argentina (OAS/Ser.L/V/II.49, doc. 19, 1980, chap. VI).

[32] See www.cidh.oas.org/res.terrorism/htm.

[33] Andries Diphapang Potsane/Minister of Defence: "There has been a radical break with the past [...] The military is not immunized from the democratic change. Maintaining discipline in the defence force does not justify the infringement of the rights of soldiers, by enforcing such military discipline through an unconstitutional prosecuting structure" (para. 14.6).

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and Protection of Human Rights
Fifty-fourth session
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ADMINISTRATION OF JUSTICE

Discrimination in the criminal justice system

Final working paper prepared by Ms. Leïla Zerrougui pursuant to Sub-Commission decision 2001/104

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Introduction

1. At its fifty-second session, in the course of preparations for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the attention of the Sub-Commission on the Promotion and Protection of Human Rights was drawn to the extent of discrimination in the administration of justice. In response to this concern, the Sub-Commission's sessional working group on the administration of justice decided, when it adopted its report, to request Ms. Leïla Zerrougui to prepare a working paper on discrimination in the criminal justice system for its next session.

2. At the Sub-Commission's fifty-third session, Ms. Zerrougui submitted a working paper to the sessional working group (E/CN.4/Sub.2/2001/WG.1/CRP.1), in which she confirmed the scale of the phenomenon of discrimination in the administration of justice and where she pointed out that she had found, in the light of the documentation she had consulted and the research she had undertaken, that discrimination appeared to be common practice in police stations, in prisons, in the courts and in places of detention used for aliens in illegal situations, refugees and asylum-seekers.

3. In her working paper, Ms. Zerrougui recalls the significance of the non-discrimination clause, equality before the law and equal protection of the law in the most relevant international instruments. She identifies the potential victims of discrimination and proposes a conceptual framework for a possible study on discrimination in the criminal justice system. This framework stresses the need for information regarding the manifestations of discrimination in the criminal justice system, while suggesting that the study should concentrate on research into and the identification of discriminatory mechanisms responsible for the persistence of discrimination in the administration of criminal justice.

4. Comments were made on the working paper by members of the sessional working group and the Sub-Commission, which included discrimination in the administration of justice as a sub-item of item 3 of the agenda of the fifty-third session on the administration of justice. The members of the Sub-Commission recognized that in view of its complexity and importance the subject required a full study, but that more detailed research needed to be undertaken on certain aspects. They stressed the need to identify discriminatory mechanisms in inter-State cooperation and those arising from the failure of national criminal justice systems to meet the requirements of vulnerable social groups, especially aliens, minorities, indigenous people and socially deprived categories. Some members suggested that the planned study should not cover discriminatory motivations in too much detail, particularly in the case of passive discrimination, but that it should also look into the operation of international criminal tribunals and the status of victims of organized crime.

5. In decision 2001/104 of 10 August 2001, the Sub-Commission, concerned at the extent of discrimination in the criminal justice system and welcoming the working paper (E/CN.4/Sub.2/2001/WG.1/CRP.1) prepared Ms. Leïla Zerrougui for the sessional working group on the administration of justice, decided to request Ms. Zerrougui to pursue her research, taking into consideration the comments made by members of the Sub-Commission, and to submit her final working paper at its fifty-fourth session. This document is submitted pursuant to that decision.

I. REVIEW OF THE SUB-COMMISSION'S CONTRIBUTION

6. The Sub-Commission has played a very prominent part in the fight against discrimination and its contribution has been considerable.[1] As far as discrimination in the administration of justice is concerned, it appears that two studies on the subject were made in the past by two members of the Sub-Commission. The first was prepared by Mr. Mohammed Ahmed Abu Rannat, Special Rapporteur of the Sub-Commission, on equality in the administration of justice.[2] The second of those studies, prepared by Mr. Justice Abu Sayeed Chowdhury, Special Rapporteur of the Sub-Commission, was entitled: "Study on discriminatory treatment of members of racial, ethnic, religious or linguistic groups at the various levels in the administration of criminal justice, such as police, military, administrative and judicial investigations, arrest, detention, trial and execution of sentences, including the ideologies or beliefs which contribute or lead to racism in the administration of criminal justice."[3] In order to capitalize on that experience and to avoid overlapping, both documents were used to prepare this working paper. The following conclusions may be drawn.

7. Mr. Rannat's study of equality in the administration of justice came at a time (in the 1960s) when the meaning of discrimination in international standards was not as precise and clear-cut as it is today. It was undertaken to examine the scope of article 10 of the Universal Declaration on Human Rights and was intended to lead to the adoption of principles, a declaration or a convention on equality in the administration of justice. The study, which concentrated on the treatment of equality in criminal, civil and administrative procedures, succeeded in setting out a set of rules for fair trial and included general recommendations on ways of preventing discrimination.

8. Nowadays, the prohibition of discrimination, equality before the law and equal protection of the law have been defined and established as a general clause and a fundamental rule of international law on human rights, not only in the administration of justice, but in all areas subject to regulation.[4] There is no need for a further study to identify the rules of fair trial or to explain the significance of equality before the law and equal protection of the law. What might be useful, however, would be to study the daily workings of criminal justice and to examine carefully the mechanisms which, in violation of international rules, tend to perpetuate discrimination in criminal justice systems.

9. Judge Chowdhury's study concerned the discriminatory treatment meted out to members of racial, ethnic, religious or language groups at different stages of criminal procedure. The Special Rapporteur made clear from the start where the emphasis of the study would be placed when he said that, with the exception of South Africa,[5] where racism was enshrined in the law, there were few regions in the world where cases of de jure discrimination against racist groups were frequently found. The study therefore concentrated on behavioural discrimination, on doctrines and practices conveying racial prejudice, and on situations which appeared to reflect a selective application of the law to specific racial, ethnic, religious or language groups.[6]

10. In other words, if a fresh study is undertaken on discrimination in the criminal justice system, it is bound to shed new light on the matter. This is firstly because it has now been established that institutionalized discrimination exists and persists in national criminal justice systems,[7] secondly because as a result of globalization and regional integration, discriminatory

practices spread across borders and take on new form,[8] and thirdly because the sort of colonialism which produced the most intolerable forms of de jure discrimination in the administration of justice has not completely disappeared.[9] This study is all the more worthwhile insofar as it appears justified by the events which are currently upsetting the international context, while its scope will be broadened by its coverage of other vulnerable or victimized groups, which are nowadays subject to discrimination in the administration of criminal justice.[10]

II. THE INTERNATIONAL CONTEXT

11. This working paper is being drafted against the background of two major international events: the World Conference against Racism, Xenophobia and Related Intolerance, which was held in Durban (South Africa) from 31 August to 8 September 2001, and the tragedy of 11 September 2001.

A. World Conference against Racism

12. While the preparatory work for the World Conference against Racism drew attention to the scale of the phenomenon of discrimination in the administration of criminal justice, the actual Declaration of the Conference is absolutely unambiguous in that respect: it not only confirmed the existence of behavioural discrimination in national criminal justice systems, but it also referred to the persistence of de jure discrimination. Paragraph 25 of the Declaration reads as follows: "We express our profound repudiation of the racism, racial discrimination, xenophobia and related intolerance that persist in some States in the functioning of the penal systems and in the application of the law, as well as in the actions and attitudes of institutions and individuals responsible for law enforcement, especially where this has contributed to certain groups being over-represented among persons under detention or imprisoned." (A/CONF.189/12)

13. The Programme of Action adopted by the Conference draws attention to inequalities of treatment regarding access to justice for people of African descent, migrants and their families, women, children, minorities, Roma, refugees and asylum-seekers and indigenous peoples. States are urged to ensure that the treatment of such persons by police and immigration services respects their dignity and is non-discriminatory, to prevent and detect effectively misconduct by police officers and other law enforcement personnel which is motivated by racism and discrimination, to implement and enforce effective measures to eliminate the phenomenon known as "racial profiling", to combat impunity, seen as a serious obstacle to a fair and equitable justice system, and to examine possible links between criminal prosecution, police violence and penal sanctions, on the one hand, and racism, racial discrimination, xenophobia and related intolerance, on the other. (A/CONF.189/12, paras. 66 et seq.)[11]

14. In other words, the manifestations of discrimination in the administration of criminal justice are clearly spelt out in the Declaration and Programme of Action of the World Conference against Racism. Follow-up bodies are planned for the Conference and the Sub-Commission on the Promotion and Protection of Human Rights has been called upon, as a mechanism of the Commission on Human Rights, to contribute to the implementation of the Conference's Programme of Action. At its fifty-eighth session, the Commission on

Human Rights adopted a decision (2002/109) inviting the Sub-Commission to give careful consideration to the Durban Declaration and Programme of Action and to play a complementary role in the realization of the objectives of the World Conference.[12]

B. Implications of the tragedy of 11 September 2001

15. The attacks of 11 September 2001 upset the whole international community and were unanimously condemned. In resolutions 1373 (2001) and 1377 (2001) adopted on 28 September and 12 November 2001 respectively, the Security Council called on all States to take a series of measures to prevent, criminalize and suppress all terrorist acts within their jurisdiction and to increase inter-State cooperation in order to eradicate international terrorism. The international community did not, however, hesitate to deplore occurrences of violations of human rights and/or humanitarian law committed in response to those attacks. Criticism was levelled, inter alia, at the legal procedures adopted and at certain measures applied in the name of counter-terrorism.[13] Arrests and incommunicado detention targeting aliens and certain communities of immigrants in a number of countries met with particularly sharp criticism.[14]

16. At its sixtieth session, on 22 March 2002, the Committee on the Elimination of Racial Discrimination adopted a statement calling on States and international organizations to ensure that any measures taken to combat terrorism did not, in purpose or effect, give rise to discrimination on the grounds of race, colour, descent or national or ethnic origin. At its fifty-eighth session, the Commission on Human Rights also adopted a resolution, in which it stressed that: "States and international organizations have a responsibility to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin and urges all States to rescind or refrain from all forms of racial profiling."[15]

17. While recalling these recommendations and criticism, we keep sight of the fact that, in order to combat terrorism, Governments often had to deal with exceptional situations and extremely serious crimes. In her preliminary report (E/CN.4/Sub.2/1999/27) submitted at the Sub-Commission's fifty-second session, Ms. Kalliopi K. Koufa, Special Rapporteur on terrorism, wrote that: "In response to the terrorists' despicable conduct and the threats posed to society, the authorities of the State which is responsible for bringing the terrorist violence to an end are entitled to adopt counter-terrorist measures and may not be constrained by the normal limits of official measures for the prevention of ordinary crime."

18. This right the States are granted is not, however, devoid of safeguards.[16] In General Comment No. 29 concerning states of emergency, adopted on 31 August 2001, the Human Rights Committee specified that even when the life of a nation is threatened, no derogation is allowed from certain rights (CCPR/C/21/Rev.11/Add.11). The same view was expressed by the High Commissioner for Human Rights at the fifty-eighth session of the Commission on Human Rights, in the introductory statement to her report on the follow-up to the World Conference on Human Rights.

19. The question of whether or not measures adopted to counter terrorism comply with international rules on human rights and humanitarian law does not fall within the terms of reference we were assigned by the Sub-Commission. Our views and analyses are concerned

only with certain provisions considered as discriminatory, related to the administration of criminal justice and/or measures in the administration of justice applied selectively on grounds purely of the nationality, religion or ethnic origin of targeted individuals.[17]

20. The paper submitted to the working group on the administration of justice drew attention to the fact that in certain crisis situations, the proportion of human rights violations increases significantly in the daily life of people and in criminal justice administration, in particular affecting the most vulnerable persons and groups and those who, rightly or wrongly, are held in any way to be responsible for the crisis (E/CN.4/Sub.2/2001/NG.1/CRP.1, para. 3). This tendency was confirmed by the tragic events of 11 September.[18]

21. In General Comment No. 29 referred to above, with regard to the non-discrimination clause, the Human Rights Committee states that "Even though article 26 or the other Covenant provisions related to non-discrimination (arts. 2, 3, 14, para. 1, 23, para. 4, 24, para. 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances."

22. Admittedly in the case of serious crimes and dangerous criminals using sophisticated means and working with organized, transnational networks, it is not always easy to reconcile respect for the guarantees enshrined in international law and the desire not to leave the most serious crimes unpunished and to bring their perpetrators to trial. Difficulties arise in particular with observance of the presumption of innocence, prolonged pre-trial detention and the conditions in which persons accused of serious crimes are detained. International criminal tribunals have come up against these problems and their ways of overcoming them have not always escaped criticism.[19]

23. A distinction must be drawn, however, between differences of treatment which may be justified by the complexity of cases, the gravity of the incriminated acts or the dangerous nature of criminals on the one hand and discriminatory measures and practices on the other. Whenever persons are arrested, detained and interrogated on grounds of their ethnic origin or religious persuasion and whenever it is stipulated in a legal measure derogating from the rules of ordinary law and offering less safeguards to the accused that the measure concerned will be applied exclusively to aliens, it is hard to maintain that such rules or practices are not discriminatory.[20]

24. If the Sub-Commission were to consider a study on discrimination in criminal justice systems, this question should be looked at in more detail with a view to ascertaining, in the case of the most serious crimes, what may be admitted in international law in terms of the differences of treatment required for the satisfactory administration of justice, with particular reference to the application thereof by international criminal tribunals, and to distinguishing criteria used in regional human rights protection systems and their application on a national basis. This matter could also be dealt with as part of a separate study, which one of the Sub-Commission members might be requested to undertake.

III. SOME FEATURES OF THE CONCEPTUAL FRAMEWORK FOR AN ENVISAGED STUDY

25. In the document prepared for the Sub-Commission's sessional working group on the administration of justice, it was stressed that a study on discrimination in the criminal justice system can be justified only if it is essentially concerned with analysing the discriminatory mechanisms that still exist in national criminal justice systems. A number of paths of research were identified and some issues were selected to serve as the basis for a study on discrimination in criminal justice systems.

26. These issues are as follows:

(a) Insufficient or ineffective protection against discrimination in regional systems for the protection of human rights and the impact this has on the effective exercise of the guarantees provided for criminal justice;

(b) Discrimination institutionalized in some regional legal standards and in bilateral conventions on cooperation in criminal matters. Such discrimination is particularly aimed at aliens;

(c) Passive or active discrimination that takes several forms and appears in some national criminal laws concerning matters of substance and/or procedure;

(d) Discrimination that is nowhere explicit but is inevitable in the absence of affirmative action and measures that would enable certain persons to exercise their rights effectively and actually benefit from the guarantees prescribed in the legal standards;

(e) Discrimination deriving from the organization and/or operation of a criminal justice and prison system that is often inadequately provided with human and material resources and ill-adapted to the needs of the most vulnerable groups and persons, owing to the precariousness of their social status;

(f) Structural discrimination, which stems from the mode of organization and operation of the police services, the nature of their tasks and the relations between the police and the courts, and the unavailability or ineffectiveness of remedies against abuses of power;

(g) De facto or behavioural discrimination that reflects racist, sexist or xenophobic attitudes expressing prejudices or often unjustified age-old fears. Such discrimination is reproduced by national criminal justice systems and policies with some specific features proper to each region or country. For further details see document E/CN.4/Sub.2/2001/WG.1/CRP.1, paragraph 41.

27. In their comments the Sub-Commission experts proposed some other lines of research and expressed the wish that the present document should deal, inter alia, with cases of discrimination in inter-State police and judicial cooperation and with discrimination that is aimed essentially at indigenous peoples, minorities, aliens, victims of organized crime and deprived persons. The following discussion attempts to take these recommendations into account:

A. The fragile status of aliens and discriminatory mechanisms in inter-State cooperation on criminal matters

28. International, regional and bilateral cooperation on matters of criminal justice is an effective method encouraged by the United Nations for combating transnational crime and especially terrorism and organized crime.[21] Such cooperation is also recommended for combating corruption, for protecting the most vulnerable victims,[22] for putting prisoners in touch with their families and for facilitating their reintegration into society.[23] Such cooperation is embodied in a series of legal instruments, in particular treaties concerning extradition, mutual assistance on police and judicial matters, transfer of proceedings, execution of judgements and transfer of foreign prisoners.[24] In principle, this legal framework should comply with the standards of international law prohibiting discrimination.

29. Unfortunately, this basic principle is not always respected. States base their cooperation in judicial and police matters on national preference and the protection of their own interests; they are primarily concerned with the security aspect, which often takes precedence over the fundamental rights of certain groups considered to be potentially dangerous or undesirable. At present these are mainly aliens, who by virtue of their foreign nationality are excluded from the application of some treaties for regional or bilateral cooperation or are the victims of direct or indirect discrimination stemming from the application of certain cooperation agreements, particularly on police matters.

30. The exclusion of aliens from the benefits provided by certain forms of cooperation has become institutionalized in multilateral and bilateral agreements concerning the transfer of foreign prisoners. In the vast majority of such agreements, and contrary to the recommendations of the United Nations, the transfer of prisoners is confined to nationals of the contracting States, thus depriving aliens residing in those States of the right to request transfer to the country where they have established their customary residence.[25]

31. And yet this form of cooperation is recommended in order not to break the family and social links of sentenced persons with their environment, and in order to facilitate their social resettlement, which is regarded as one of the objectives of the sentence[26] and is virtually impossible to achieve in an environment other than their own. It is also desirable and encouraged in order to avoid unequal treatment depriving foreign prisoners of such personal measures as early release, prison leave and special release arrangements that differentially extend the period of imprisonment.[27]

32. This difference in treatment based on nationality is aggravated by the precarious status of aliens in national standards and in regional systems for the protection of human rights, and in practice is reflected in the systematic deprivation of foreign prisoners of all rehabilitation and resettlement measures.

33. Thus the European Convention for the Protection of Human Rights does not protect aliens, even those lawfully resident in a European State, against expulsion. Article 1 of additional protocol No. 7 recognizes the right of Member States to expel aliens or escort them to the frontier in pursuance of a decision reached in accordance with law. This provision is also

contained in the American Convention on Human Rights (art. 22, para. 6) and in the African Charter on Human and Peoples' Rights (art. 12, para. 4). In application of this right accorded to States, national courts have frequently considered the expulsion of aliens, even those lawfully resident, following convictions for offences of varying seriousness, as a measure necessary in the interests of public order and therefore taken in accordance with law.[28]

34. Expulsion following a criminal conviction is a current practice even with regard to aliens who have very strong family ties in the country where they are lawfully resident. This subjects them to double punishment when they are convicted because after serving their sentence they are generally expelled to their country of origin even though family, social and sometimes cultural links with that country no longer exist or never did exist. National courts take the view that the expulsion of a foreigner is a police measure and does not constitute a criminal sanction. In the European context a distinction is made between European and non-European aliens, whereby only the latter are exposed to the risk of expulsion.[29]

35. Expulsion following a criminal conviction may not in itself be regarded as discrimination if it does not produce inequality of treatment depriving aliens of certain rights or infringing the recognized rights of all persons without distinction. In practice, since they are eligible for expulsion, foreign prisoners are routinely remanded in custody until their trial, and after their conviction they are denied any measures of social resettlement.

36. With the formation of regional integration groups the rights of nationals of these groups of countries are strengthened and judicial and police cooperation for their protection develops, but at the same time new forms of discrimination are generated towards non-nationals, even those lawfully resident in these countries.[30] In such regions, exclusions and discriminatory practices towards aliens are most commonly brought about through police cooperation.[31] Clandestine immigration and unlawful residence, particularly in countries with a large flow of migrants, are increasingly being assimilated to criminal behaviour and are the subject of cooperation between the police and immigration services.[32]

37. Discrimination arising out of inter-State cooperation on criminal matters is not the only form of discrimination suffered by aliens; the most flagrant discrimination is to be found in national laws, to which must be added de facto or behavioural discrimination.[33] These people, who are stigmatized and rendered vulnerable on account of their foreign nationality, are often subjected to unequal treatment that infringes their rights and facilitates their exploitation by criminal organizations.

38. While the battle against organized transnational crime mobilizes judicial and police cooperation, this cooperation often ignores the rights of the victims of such crime. Thus the victims of trafficking for the purpose of sexual exploitation, of forced or clandestine labour, or of networks of drug traffickers are considered to be potentially dangerous people who need to be deported or escorted to the frontier as soon as possible. Such persons are often kept in custody pending their expulsion; their grievances concerning the violations to which they were subjected during their stay are rarely listened to, and even when the perpetrators of such violations are prosecuted the chances of success are minimal.[34]

39. Among the most vulnerable victims of organized crime, it is foreign women who are the most deeply wronged; they are subjected to threefold discrimination: as women they are discriminated against within their own group; as victims of the sex trade they are discriminated against within society and by the courts;[35] and as aliens in an unlawful situation they are particularly vulnerable because they are at risk of expulsion or imprisonment used as a "means of protection".[36] In the hands of traffickers and pimps, these victims suffer various types of maltreatment, such as harassment, rape and physical attacks, not to mention restrictions on their freedom. They are often treated as criminals by the authorities of the countries to which they are taken. If they are in an irregular situation in the country where they are living and dread returning to their country of origin, the risk of deportation guarantees their silence and ensures that the criminals go unpunished. The insignificant number of prosecutions of the perpetrators of the trade in women is instructive when compared with the true extent of the problem.

40. With regard to the deportation and escorting to the frontier of people who are present unlawfully in the territory of a foreign country, the international standards only provide protection against their expulsion to a country where they are in danger of suffering inhuman or degrading treatment or when there is a genuine threat to their right to life in that country. However, several United Nations mechanisms have criticized the practice of systematic or mandatory detention of immigrants in an unlawful situation or of refugees and asylum-seekers.[37]

41. During their stay, these particularly vulnerable people are often the victims of human rights violations, as occurs with workers brought in clandestinely and exploited in violation of international standards, persons subjected to enforced prostitution or those who have suffered inhuman or degrading treatment on police premises or in the provisional detention centres provided for them.[38]

42. Even when prosecutions have been instituted, the host countries - often worried by security or internal political considerations - generally refuse these people the right to remain in the country pending the trial of the perpetrators of the violations. This refusal deprives them de facto of an acknowledged right of all victims, that of attending the trial and demanding redress. This enforced absence of the victims benefits the perpetrators of the violations, who often escape conviction because after an expulsion measure the victims are no longer allowed to re-enter the country and even if they are allowed, they often lack the resources to return in order to attend the trial or to have themselves represented by a lawyer.[39]

43. These few examples of direct or indirect discrimination, attributable either to the low level of protection for aliens or to inter-State cooperation on criminal matters, are not the only forms of discrimination to which aliens are subjected. As a particularly vulnerable group, non-citizens are faced with other forms of discrimination which they often share with other vulnerable or low-status populations. Such discrimination is intrinsically linked to structural situations of injustice and low esteem. National criminal justice systems reproduce the prejudices and stereotypes of society and in many countries are designed by the dominant groups and are therefore unsuited to the needs of the dominated or low-status groups.

B. The unsuitability of national criminal justice systems for the needs of vulnerable populations

44. Crime is a reason often put forward to justify the ghettoization, marginalization or exclusion of the most vulnerable groups of society, the very people whose rights over the centuries have been reduced, in public life and/or the family, to non-rights or lesser rights. These are women, children, minorities, indigenous groups, aliens and all the people on the fringe of society who are stigmatized for one reason or another; since the crime rate among these groups is for objective reasons generally high, the criminal argument and crime statistics are brandished to justify exclusion and discrimination.

45. This brief outline conceals a reality that cannot be denied, the correlation between criminal behaviour and a deprived socio-economic situation, which is particularly characteristic of migrant workers and their families, some national minorities and indigenous peoples.[40] For the last two categories, the historical context is not irrelevant to the disproportionately high rates of crime and victimization compared with the size of these groups in society.[41] The policies of extermination, exclusion or enforced assimilation imposed upon these communities by the dominant groups have led to disturbances and caused the break-up of the value systems that used to preserve cohesion within these groups; their traditional values often differ from those that others try to impose upon them and which they have difficulty in assimilating.[42]

46. Specialists claim that criminals belonging to marginalized social categories reject the criminal justice system, which they describe rightly or wrongly as "unfair". This attitude is used to justify actions for which responsibility is placed on society and to absolve the perpetrators from guilt, thus leading to an increase in the rate of recidivism, especially among young people from these groups. Erica-Irene Daes, Chairperson of the Sub-Commission's Working Group on Indigenous Populations, confirms that indigenous peoples often refuse to accept the judicial system. The fact remains that for some underprivileged groups, the criminal justice system in force in the host countries or even in their own countries is not adapted to either their problems or their needs and is often inaccessible to them, thus perpetuating exclusion and sometimes displaying gross discrimination.[43]

47. Unfortunately, these familiar problems, often used to explain the increasing crime rates among such groups, do not lead to the adoption of appropriate policies for crime prevention and for social resettlement of reformable criminals. Prevention and resettlement require the mobilization of resources that neither politicians nor society are prepared to provide. Consequently, so as to give the impression that they are responding to the legitimate concerns of citizens faced with increasingly sophisticated and organized crime, Governments opt for incarceration and ever more repressive measures.[44]

48. The non-governmental organization Penal Reform International describes this reality on page 6 of its annual report for 2000: "Proportions of people from ethnic minorities in the prison population in very many countries are higher than that in the general population. Studies have shown that this is frequently the result of racial bias in police and court activities, and that people from ethnic minorities are also discriminated against within prison. In some countries, there are

substantial numbers of foreigners in prison who may have difficulty with the national language and therefore have limited access to information vital to their case. They may also experience many other problems in prison.[45] Mentally disturbed people have special difficulties within justice systems and are often imprisoned inappropriately as opposed to receiving hospital treatment. Often children in conflict with the law are imprisoned and harshly treated, in contravention of international standards designed to protect and promote children's rights. ... Women form less than 5 per cent of prison populations in most countries. Because they are in a minority, their specific needs are often overlooked. They are often imprisoned far from their homes, further damaging important family relationships."

49. In the developing countries - and even though in some of them the will may exist to battle effectively against criminality, which is often poverty criminality - the means are sorely lacking, so that the only response remaining is automatic incarceration, often under unacceptable conditions.[46] In most of these countries the prisons are overcrowded and the justice system lacks the resources to guarantee a fair trial for poor defendants who are unable to afford a good-quality defence or even any defence at all. Legal assistance is confined at best, and in the most serious cases, to the appointment of an official lawyer to assist the defendant on the day of the trial.[47]

50. People in the indigent social categories, who are often over-represented in the criminal justice system, are faced with other forms of discrimination resulting from their insolvency. For example, because they are unable to find the amounts required for release on bail they are detained in custody until their trial. In some countries insolvent prisoners who are unable to pay the fine to which they have been sentenced are kept in detention for the purpose of enforcement by committal. Some systems authorize imprisonment for private debt, in violation of article 11 of the International Covenant on Civil and Political Rights (insofar as the countries have ratified it).[48]

51. In resolution 56/161 adopted on 9 December 2001 on human rights in the administration of justice, the United Nations General Assembly: "appeals to Governments to include in their national development plans the administration of justice as an integral part of the development process and to allocate adequate resources for the provision of legal-aid services with a view to promoting and protecting human rights, and invites the international community to respond favourably to requests for financial and technical assistance for the enhancement and strengthening of the administration of justice".

52. Discrimination against persons who belong to indigent populations takes a number of forms: it may be deliberate,[49] it may be passive,[50] and sometimes its discriminatory nature is revealed through the application of a law that applies to all.[51]

IV. CONCLUSIONS AND RECOMMENDATIONS

53. The present document discusses only a few aspects of a complex phenomenon that is on the increase and which is regularly denounced by all the United Nations mechanisms, each within the limits of its mandate. At this stage the objective has simply been to consider some of

the recommendations contained in the comments made by members of the Sub-Commission during the presentation of the working document prepared for the sessional working group on the administration of justice.

54. In dealing with this subject, some of the shortcomings or inadequacies that lead to discrimination in the administration of criminal justice have been dealt with, but the author has endeavoured above all to disregard the peripheral forms of discrimination that are not directly attributable to the administration of criminal justice but which are passively or actively applied or reproduced by the system. This approach will make it possible, if a study on discrimination in the criminal justice system is considered by the Sub-Commission, to concentrate future work on criminal justice procedure and on the organization and operation of police services and of judicial and prison administration in order to detect and identify discriminatory mechanisms and discrimination de jure in legislation concerning matters of substance and/or procedure and to make useful recommendations. The Sub-Commission could make a qualitative contribution to further the debate that has been initiated by other United Nations mechanisms concerning the need to reform the criminal justice system so as to ensure its effectiveness without sacrificing equity.[52] As pointed out above, the Sub-Commission is also expected to make a contribution to the implementation of the Programme of Action of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

Notes

[1] The working paper prepared by Mr. Sérgio Pinheiro, member of the Sub-Commission, in preparation for the World Conference against Racism, gives an outline of this contribution (A/CONF.189/PC.1/13/Add.1).

[2] This study was the sixth in a series of studies undertaken by the Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning discriminatory measures in various fields. It was started in 1963 and completed in 1969. Mohamed A.A. Rannat, *Study of equality in the administration of justice* (United Nations publication, Sales No. F.71XIV.5).

[3] The study was published in two parts, the first in 1981 under reference E/CN.4/Sub.2/L.766, and the second in 1982 under reference E/CN.4/Sub.2/1982/7.

[4] This question has already been covered in the working paper submitted to the Sub-Commission's working group on the administration of justice (E/CN.4/Sub.2/2001/WG.1/CRP.1, pp. 3-8).

[5] At the time South Africa was subject to the rules of apartheid.

[6] The study includes three chapters, the first of which analyses the historic causes of racial discrimination and underlying doctrines and prejudices, and the third of which - entrusted to Mr. Louis Joinet by Sub-Commission decision 2001/103 - concerns the operation of military courts. Only chapter II, dealing with discriminatory practices in police and criminal justice procedures, could be used and updated in the event of a new study being undertaken.

[7] Discriminatory provisions, particularly affecting women, children, indigenous people, minorities and aliens, appear in the criminal laws of several countries. See in particular the report of the United Nations High Commissioner for Human Rights submitted pursuant to General Assembly resolution 48/141 (E/CN.4/2001/16) and the paper of the tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders entitled "Women in the criminal justice system" (A/CONF.187/12).

[8] This paper deals with certain aspects of these new forms of discrimination, which are targeted chiefly at migrants, refugees and asylum-seekers, and the victims of trafficking.

[9] The Special Rapporteur of the Commission on Human Rights, Mr. John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, in his report to the fifty-eighth session of the Commission, gives an outline of discriminatory practices of the Israeli judicial system in the occupied territories (E/CN.4/2001/32, paras. 48-53).

[10] These groups were identified in the document prepared for the working group on the administration of justice, which refers in paragraph 39 to "the wide range of discriminatory practices and of the grounds of discrimination to which the victims are subjected, depending on their alienness, sex, ethnic or religious affiliation, age, disability, sexual orientation or material disadvantage, as the case may be, with some cases even involving double or triple discrimination" (E/CN.4/Sub.2/2001/WG.1/CRP.1).

[11] In this respect it is worth highlighting the significant effort made by non-governmental organizations in Durban to include discrimination in the administration of criminal justice in the Programme of Action of the World Conference. See in particular the contributions by Amnesty International, the World Organization against Torture, Penal Reform International and International Criminal Justice CAUCUS.

[12] A second draft decision (E/CN.4/2002/L.82) submitted under item 6 of the agenda was withdrawn by its joint authors.

[13] Counter-terrorist laws were passed in several countries in the weeks following the attacks against New York and Washington, but it was the legal measure introduced by the Government of the United States which attracted most criticism, especially the "Presidential Order on Military Tribunals" of 13 November 2001. That measure was considered by well known intellectuals and human rights defenders as discriminatory and in violation of international law and the United States Constitution. See in particular the criticism expressed by Robert Kodok Goldman, Chairman of the Inter-American Commission on Human Rights, under the title "Why President Bush's Military Order Runs Afoul of the Law", and the article published in *Le Monde* of 29 November 2001 entitled "*Après la victoire, la justice*", by Robert Badinter, former French Minister of Justice and Senator. See also the report by Dato' Param Cumaraswamy, Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers (E/CN.4/2002/72, para. 208) and the publications by Amnesty International, Human Rights Watch and the International Federation of Human Rights.

[14] See the report published by Amnesty International in March 2002: "Amnesty International's concerns regarding post-September 11 detentions in USA" (AI Index: AMR 51/044/2002).

[15] See the related resolution entitled "Racism, racial discrimination, xenophobia and related intolerance" (E/CN.4/2002/68).

[16] In a joint statement dated 29 November 2001 by the United Nations High Commissioner for Human Rights, the Secretary-General of the Council of Europe and the Director of the Organization for Security and Cooperation in Europe (OSCE), the view is expressed that: "While we recognize that the threat of terrorism may require specific measures, we call on all Governments to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent. Such steps might particularly affect the presumption of innocence, the rights to a fair trial, freedom from torture, privacy rights, freedom of expression and assembly, and the right to seek asylum. Anti-terrorism measures targeting specific ethnic or religious groups would also be contrary to human rights law and international commitments and would carry the risk of sparking a dangerous upsurge of discrimination and racism."

[17] Amnesty International has published a document entitled "Rights at Risk. Amnesty International's concerns regarding security legislation and law enforcement measures", in which it mentions countries which have adopted legislation containing provisions which are discriminatory and incompatible with the rules of fair trial. Those countries include China, Egypt, Israel, Malaysia, Turkey, United Kingdom, United States, Zambia and Zimbabwe. It also mentions the draft text on the European arrest warrant (AI-index: ACT30/001/2002).

[18] The High Commissioner for Human Rights confirmed this tendency in the above-mentioned introductory statement in the following terms: "On 10 December 2001, on the occasion of Human Rights Day, 17 special rapporteurs and independent experts of the Commission on Human Rights expressed their concern over reported human rights violations and measures that have targeted particular groups such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media. Ensuring that innocent people do not become the victims of counter-terrorism measures."

[19] In Deliberation No. 6, the Working Group on Arbitrary Detention gave a review of the circumstances and conditions which, before an international tribunal, might justify the maintenance of detention or prolonged pre-trial detention for persons accused of serious crimes. In support of its jurisprudence the Working Group referred to the practices of national courts. See the report of the Working Group on Arbitrary Detention for the year 2000 (E/CN.4/2001/14, paras. 12-33).

[20] Equality between citizens and aliens before the law and before the courts is enshrined in several United Nations instruments. In General Comment No. 15, the Human Rights Committee states that aliens are entitled to equal rights with citizens before the courts and to a fair and public hearing by a competent, independent and impartial tribunal established by law. The same principle is referred to in the Declaration on Victims. Concerning the rights of aliens, see the work published by UNESCO in 2001 entitled "United to Combat Racism. Dedicated to the World Conference against Racism, Racial Discrimination, Xenophobia and Related

Intolerance". This document recalls the rights granted in international and regional norms to migrant workers, Stateless persons, refugees and asylum-seekers and highlights equality before the courts between citizens and aliens. See also the preliminary report of the Special Rapporteur, David Weissbrot, on the rights of non-citizens (E/CN.4/Sub.2/2001/20 and Add.1).

[21] In the fight against terrorism, inter-State cooperation is not only encouraged but is an obligation for all States. In its resolution 1373 (2001), which is immediately applicable, the Security Council expresses concern at the connection between international terrorism and organized crime, illicit drugs, money-laundering an illegal movement of nuclear, chemical, biological and other potentially deadly materials and emphasizes the need for national, subregional, regional and international coordination in order to respond to these threats to international security. The Security Council calls upon all States to apply the measures adopted and threatens sanctions against any that refuse to cooperate.

[22] A number of mandatory international instruments call upon States to strengthen cooperation in order to protect the rights of certain vulnerable victims, including women, children and migrants. Specifically these are the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; the United Nations Convention against Transnational Organized Crime and its two additional protocols, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants. These instruments have been adopted by the United Nations General Assembly and should in principle enter into force during 2002.

[23] See the model treaties on international cooperation in criminal matters, in particular those concerning the transfer of proceedings in criminal matters and the transfer of supervision of offenders conditionally sentenced or conditionally released and the Model Agreement on the Transfer of Foreign Prisoners. Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice (United Nations publication, Sales No.: E.92.IV.1 and corrigendum).

[24] Of the systems of regional cooperation on criminal and prison matters, the European system is by far the most successful; it is based on a substantial body of legal instruments that ensure very close and effective inter-State cooperation on criminal matters, especially in the European Union, in order to combat crime, to protect the rights of victims, to improve the conditions of detention and to encourage the reintegration of offenders into society. See Daniel Fontanaud, *La coopération judiciaire en Europe*, La Documentation française, No. 786, 20 June 1997.

[25] Article 1 of the Model Agreement on the Transfer of Foreign Prisoners, adopted by the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, stipulates as follows: "The social resettlement of offenders should be promoted by facilitating the return of persons convicted of crime abroad to their country of nationality *or of residence* to serve their sentence at the earliest possible stage. In accordance with the above, States should afford each other the widest measure of cooperation". This recommendation has been implemented only partially in the treaties concerning the transfer of foreign prisoners, whether they be multilateral or bilateral treaties, since the criterion applied is nationality and foreigners who have established their customary residence in the States parties to such treaties are excluded.

See the European Convention of 21 May 1983 on the Transfer of Sentenced Persons; see also the bilateral agreements between the United States of America and several countries, between Spain, Portugal and some countries of Latin America, between France and several African States, etc.

[26] Article 10, paragraph 3 of the International Covenant on Civil and Political Rights states: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation".

[27] This difference in treatment is contrary to the United Nations Standard Minimum Rules for the Treatment of Prisoners, which lay stress on social resettlement and prohibit discrimination in the treatment of prisoners.

[28] See M. Fabre and A. Gouron-Mazel, *Convention européenne des droits de l'homme. Application par le juge français: 10 ans de jurisprudence*, Edition LITEC, 1998, pp. 158-190. In many countries the law specifically provides for the automatic expulsion of aliens, even those lawfully resident, when they are given a prison sentence. If there are difficulties in deporting them after completion of their sentence, the aliens, even minors, are kept in detention.

[29] The European Court of Human Rights, applying the "ricochet" theory for the rights not recognized by the European Convention on Human Rights, particularly as regards the expulsion, escorting to the frontier and extradition of non-European aliens, has endeavoured in its judicial decisions to make up for the shortcomings of the Convention by imposing on Member States a number of restrictions that take into account the risks incurred by the persons concerned, their links with the country where they are resident and infringements of respect for private and family life. In order to decide whether there is any violation the Strasbourg judges refer, as the case may be, either to the provisions of the European instruments or to the standards of international law, but always with the following end in view: the European Convention must be interpreted in such a way as to guarantee rights that are real and effective, not theoretical and imaginary. See Jean Pradel and Geert Corstens, *Droit pénal européen*, Paris, Dalloz, 1999, pp. 286-289.

[30] Thus article 3 of the European Convention of 24 November 1983 on the Compensation of Victims of Violent Crimes excludes non-European victims from the compensation provided for by this agreement, stipulating that "compensation shall be paid by the State ... to nationals of all member States of the Council of Europe ...". It must be pointed out, however, that the reference to the instruments of judicial and police cooperation of the Council of Europe or the European Union unfortunately does not mean that the exclusions and discrimination described are confined to that area. The same concerns and the same restrictions are to be found in the majority of regional cooperation agreements, particularly when there is a substantial flow of migration towards the contracting countries. Exclusions and inequitable differences in treatment depriving aliens of some of the recognized rights of all persons without distinction, sometimes exposing them to inhuman and degrading treatment, have been noted by the United Nations human rights monitoring mechanisms in the Gulf States, the United States of America, Japan, Korea, Australia, Canada and in countries of the South that serve as transit points or host countries for displaced populations and refugees fleeing from wars and persecution. See in particular the concluding observations made by the treaty bodies when considering the periodic reports of member States.

[31] See *La justice pénale et l'Europe*, edited by F. Tulkens and H.D. Bosley, Brussels, Bruylant, 1996, and in particular F. Brion, "Les menaces d'une forteresse citoyenneté, crime et discrimination dans la construction de l'Union européenne", p. 253, and N. Busch, "Les fichiers automatisés", p. 135.

[32] The Additional Protocol against the Smuggling of Migrants clearly stipulates that the victims of the smuggling of migrants are victims and should not be subject to criminal prosecution, whereas in some countries clandestine immigration constitutes an offence under criminal law.

[33] See chapter II of the above-mentioned study by Mr Justice Abu Sayeed Chowdhury (E/CN.4/Sub.2/1982/7).

[34] See Theo van Boven, "Common problems linked to all remedies available to victims of racial discrimination", p. 8 (HR/GVA/WCR/SEM.1/2000/BP.5). This document was submitted in preparation for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

[35] The courts are not only ill-equipped to deal with this type of crime but they reproduce the stereotypes concerning *provocation* or the *responsibility* of the victims of sexual attacks and the exploitation of prostitution. Generally speaking, criminal justice systems have little understanding of or ignore the victimization of women, on account of the historical tradition of violence inflicted on them and the erroneous sociological and psychological perception that does not always recognize the criminal nature of certain types of violence against women. With regard to the violence suffered by women, see the various reports of the Special Rapporteur on violence against women, its causes and consequences, and the report entitled "Discrimination against migrants - migrant women: in search of remedies" submitted by the Special Rapporteur on the human rights of migrants in preparation for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (A/CONF.189/PC.1/19).

[36] This practice, sometimes used against the victims' wishes, has been denounced by Ms. Radhika Coomaraswamy, Special Rapporteur on violence against women, its causes and consequences (E/CN.4/2001/73/Add.2) and by Ms. Gabriela Rodríguez Pizarro, Special Rapporteur on the human rights of migrants (E/CN.4/2000/82 and E/CN.4/2002/94) in their respective reports to the Commission on Human Rights. They also brought the matter to the attention of the Working Group on Arbitrary Detention and asked it to consider this problem, which they had noted in the territories and countries they visited in the course of their respective mandates. In the report it submitted to the fifty-eighth session of the Commission on Human Rights, the Working Group urged that recourse to deprivation of liberty in order to protect victims be reconsidered and be supervised by a judicial authority and in any case that the measure should be used only as a last resort and when the victims themselves desire it (E/CN.4/2002/77).

[37] The Working Group on Arbitrary Detention dealt with the issue of administrative custody of immigrants, asylum-seekers and refugees in its annual reports for 1999 and 2000 and specified their rights in its Deliberation No. 5 (E/CN.4/1999/63, E/CN.4/1999/63/Add.3 and Add.4 and E/CN.4/2001/14). The Human Rights Committee set out its position on the mandatory detention

of migrants in an unlawful situation during its consideration of the periodic report of Australia (CCPR/AUS/98/3 and 4). In its concluding observations dated 28 July 2000, the Committee considered that: "the mandatory detention under the Migration Act of 'unlawful non-citizens', including asylum-seekers, raises questions of compliance with article 9, paragraph 1, of the Covenant, which provides that no person shall be subjected to arbitrary detention. The Committee is concerned at the State party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organizations to the detainees in order to inform them of this right. The Committee urges the State party to reconsider its policy of mandatory detention of 'unlawful non-citizens' with a view to instituting alternative mechanisms of maintaining an orderly immigration process. The Committee recommends that the State party inform all detainees of their legal rights, including their right to seek legal counsel". Australia is not the only country to apply mandatory detention; other countries also practise this, especially after 11 September 2001.

[38] In police stations and detention centres, clandestine immigrants are particularly exposed to racial hatred and xenophobia. In November 2000 South Africa was deeply distressed by a video cassette broadcast by the South African Broadcasting Corporation; *Newsweek* (20 November 2000) reproduced its content in an article entitled "Brutal tale on the tape": "The tape is brutal and raw. Off camera, a voice announces the start of a 'dog training video'. Then six white South African policemen set their German shepherds on three defenceless black men. As the dogs chew on the victims' arms, legs and faces, the men scream and beg for mercy. The cops respond with punches, kicks and racial slurs. Toward the end of the edited 14-minute tape, one of the policemen draws his gun as if to execute one of the men. Another throws rocks at one of the victims as he shakes with fear... The policemen reportedly entertained friends by showing the 1998 home video at barbecues. The victims must have seemed safe targets - the SABC said all three were suspected illegal immigrants from Mozambique." Here it must be stressed that credible sources state that discrimination creates a climate conducive to the practice of torture and inhuman and degrading treatment. See the 2001-2002 compilation submitted by the World Organization Against Torture for the World Conference in Durban and the annual report of the Special Rapporteur on the question of torture submitted to the fifty-seventh session of the Commission on Human Rights (E/CN.4/2001/66, paras. 4-11).

[39] The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by United Nations General Assembly in resolution 40/34 of 29 November 1985 guarantees victims the right to be present at the trial, to receive assistance in defending themselves, to be informed of the progress of the proceedings and to take part in the decision-making process. See also the report by Mr. Cherif Bassiouni containing the revised version of the basic principles and guidelines elaborated by Mr. Theo van Boven on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (E/CN.4/2000/62). The Commission on Human Rights, in resolution 2002/58 on violence against women migrant workers adopted at its fifty-eighth session, calls upon States, to the extent possible, to provide the victims of violence with legal and consular assistance, to take measures that will allow them to be present during the judicial process and to safeguard their dignified return to the country of origin.

[40] In a study based on the concluding observations of the Committee on the Rights of the Child for the period 1993-2000 entitled "Juvenile justice: the unwanted child of State responsibility", Bruce Abramson writes: "As the Committee sometimes points out, detention facilities and police contacts frequently have 'over-representations' of the poor and minority groups. This affects reform in multiple ways. For one, marginalized groups have the least ability to influence reform; for another, when tensions exist between social groups, there will be more abuses of power by individuals, whether they be police officers, staff in closed facilities, judges, or elected officials. And finally, we cannot hope to make significant progress in preventing juvenile crime when a State does not make a real commitment to tackle the deeper social injustices that lie behind the 'over-representation' of poor and marginalized groups in prisons."

[41] All the mechanisms for the monitoring or protection of human rights denounce the abnormally high rates of victimization and detention of Afro-Americans, Aborigines, Dalits, Roma, children of indigenous peoples and migrant workers and other communities stigmatized by age-old structural injustices in several regions of the world. In resolution 2002/77 on "the question of the death penalty", adopted by the Commission on Human Rights at its fifty-eighth session, the Commission notes that in some countries persons belonging to national or ethnic, religious and linguistic minorities appear to be disproportionately subject to the death penalty.

[42] The Canadian Criminal Justice Association writes of indigenous peoples as follows: "Over the past 30 years, there have been numerous studies, reports and justice inquiries across the country, and a growing body of statistical information, that confirm that Aboriginal peoples experience disproportionately high rates of crime and victimization, are over-represented in the court and the correctional system, and further, feel a deep alienation from a justice system that is to them foreign and inaccessible ... The justice system does not provide pamphlets or signs ... in Aboriginal languages and those who speak only Aboriginal languages are not permitted to be jurors ... Problems can also occur when the individual called upon to interpret for the Aboriginal offender is not trained for this task and has limited knowledge of legal concepts". See the Bulletin published on 15 May 2000 entitled "Aboriginal peoples and the criminal justice system".

[43] In the eleventh edition (2002) of the publication "Attacks on Justice", which is devoted to a study of the judicial systems in 47 countries, the Centre for the Independence of Judges and Lawyers (CIJL), referring to the work of the Chairperson of the Working Group on Indigenous Populations, describes the discrimination suffered by indigenous populations in the administration of justice in Mexico: "The language difficulties faced by non-Spanish-speakers and the lack of translators are among the gravest problems confronting indigenous people in the administration of justice" (pp. 368 and 369).

[44] In its annual report for 1999, the non-governmental organization Penal Reform International writes: "The reduction in social programmes and the high unemployment rate resulting from a worsening of the economy have fostered crime and violence, two serious problems in the Caribbean. Consequently, the Governments of the region are under heavy pressure from their populations for the severe punishment of violent crimes. Some public prosecutors are in favour

of the death penalty and the entire region is suffering from terribly overcrowded prisons and an unenlightened approach to sentencing. The prisoners are for the most part young first offenders convicted of minor offences, particularly minor infringements of the legislation on narcotics".

[45] See the annual reports of Gabriela Rodríguez Pizarro, Special Rapporteur of the Commission on Human Rights on the human rights of migrants. On page 4 of her report on her visit to Ecuador in 2001, she writes: "In the prison system, the Special Rapporteur noted with concern the situation of many foreign detainees who benefit from no representation from their countries' consuls. She was provided with testimony from persons unable to speak English or Spanish who had been tried without even being able to communicate with their defence counsel, in the absence of interpreters for their languages Most detainees in such situations come from African, East European and Asian countries. The Special Rapporteur also encountered foreigners imprisoned for ordinary offences who, though they claimed to have served their sentences, remained in prison because they had no travel documents or money for the journey home" (E/CN.4/2002/94/Add.1). The Working Group on Arbitrary Detention made similar findings during its visit to Bahrain: "In its interview with prisoners, the delegation found that there were a very large number of foreigners serving prison sentences; many of them spoke neither Arabic nor English, yet had been sentenced without a lawyer present. Some were in prison for offences their employers said they had committed, which in some cases appeared to relate to labour-law disputes; they could call their consulates, but in practice the consulates let things be and neither visited them nor offered assistance" (E/CN.4/2002/77/Add.2, para. 94).

[46] In an article entitled "In the house of horror", the *Economist* of 11-17 November 2002 (p. 81) describes the conditions under which vulnerable prisoners are kept in a São Paulo prison: "The other prisoners and the warders call them amarillos (yellows). That is the colour their skin has turned after so much time spent squashed together: as many as 10 of them in a sparsely furnished cell intended for one or two. There is almost no fresh air, let alone sun. The yellows are caged up in a jail within a jail, along a dark corridor in pavilion Five of São Paulo's giant Carandiru prison. ... most of the yellows ... are too poor to buy a decent cell on the unofficial 'property market' which is operated in the less dismal parts of the prison by inmates and, it is said, jailers."

[47] The Working Group on Arbitrary Detention noted in its report on its visit to Bahrain in October 2001: "In practice, according to information from a number of past and present detainees and certain lawyers, legal representation is not permitted during police custody, despite there being no law against it. Generally speaking, it is only when a person is brought before a judge that the family hires a lawyer. For indigent persons, defence counsel is officially assigned only in criminal cases and only when a case comes to court ... As all the preparatory proceedings are handled by the police, they take place - even in criminal cases - with no lawyer present and counsel is officially assigned to represent the accused only on the day of the trial. According to consistent reports from present and former detainees, the officially assigned counsel will often conduct a single interview with his client before defending him the same day" (E/CN.4/2002/77/Add.2, para. 65).

[48] Ibid., paras. 92 and 93.

[49] Sometimes the law requires a bond from a victim who wishes to bring criminal indemnification proceedings. In some legislations (France, Spain, Belgium and Arab laws) the victim may exercise the remedy of action, that is, he or she may make up for the inaction or deficiencies of the prosecution service by exercising the public right of action, but is required to post a bond.

[50] Passive discrimination takes several forms: establishing laws without specifying the procedures for their application, failing to take the positive actions that are essential for eliminating discrimination and for guaranteeing equal treatment for the most indigent, discouraging victims by the slowness of procedures and their uncertain results, demanding a level of proof that is difficult to provide, failing to protect vulnerable victims against reprisals, etc. All these aspects could be dealt with as part of a study on discrimination in criminal justice systems.

[51] For example, the adoption in Western Australia and the Northern Territory of a system of minimum penalties and mandatory imprisonment for certain offences against property has resulted in practice in an increase in the incarceration rate for Aboriginal minors. When considering the periodic reports of Australia, the Committee on the Rights of the Child (see A/53/41), the Human Rights Committee (see CCPR/C/AUS/98/3 and 4) and the Committee on the Elimination of Racial Discrimination (see A/55/18) have all taken the view, in respect of their own area of responsibility, that this law has had discriminatory repercussions for the indigenous peoples in their dealings with criminal justice and has led to the imposition of penalties unrelated to the severity of the offences committed. In the administration of justice, minors who belong to indigent or low-status social categories are particularly vulnerable and are subjected to discriminatory practices in many countries.

[52] The Commission on Crime Prevention and Criminal Justice has decided to discuss the following topic at its forthcoming eleventh session: "Reform of the criminal justice system: achieving effectiveness and equity".

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Agenda item 3

ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY

Scope of the activities and the accountability of armed forces, United Nations civilian police, international civil servants and experts taking part in peace support operations (i.e. all operations of a peacekeeping or peace enforcement nature under a United Nations mandate)

Work in progress submitted by Françoise Hampson in accordance with Sub-Commission decision 2001/105*

1. In its decision 2001/105, the Sub-Commission, recalling its resolution 2000/24 and Commission on Human Rights resolution 2000/68 and taking note of Commission resolution 2001/70 and the background information provided in document E/CN.4/Sub.2/2001/WP.1, decided to entrust Ms. Françoise Hampson with the task of preparing a working paper on the scope of the activities and the accountability of armed forces, United Nations civilian police, international civil servants and experts taking part in peace support operations.

* The document was submitted after the date set by the General Assembly for reasons beyond the control of the secretariat.

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2. The study does not examine the lawfulness of such operations under the Charter of the United Nations.

3. Most of the information needed for the working paper has now been gathered from a variety of sources.

4. The guidance of the Sub-Commission is sought on the following issues:

(a) The operations to be covered - should they be confined to United Nations-mandated operations involving a United Nations force or should they also include (i) United Nations-mandated operations not involving a United Nations force and/or (ii) operations which some argue do not have a United Nations mandate? The view of the author is that the study should include all operations which have a United Nations mandate, whether or not the force is a United Nations force, since the United Nations might be thought to have some responsibility for any operation it mandates, whoever carries it out. Operations which do not appear to have a United Nations mandate should not be included because the United Nations would appear to have no responsibility for the operation;

(b) Should the study examine the discharge of any human rights mandate given to the mission? It is suggested that a distinction should be drawn between acts of individuals and/or contingents which are in conflict with human rights standards and the implementation of a human rights mandate. The only exception would be where individuals and/or national contingents act in conflict with human rights standards whilst engaged in activities in implementation of a human rights mandate (e.g. train local police to engage in activities which would violate human rights standards);

(c) Issues surrounding prostitution and trafficking in women. Resorting to the use of prostitutes does not appear, in and of itself, to be in conflict with human rights standards, whether or not it is in breach of military discipline or other internal rules applicable to a force. Where the prostitute is not acting voluntarily, whether or not as a result of trafficking, the individual client may be knowingly having sexual relations with a person who is being held in a form of slavery or forced labour. In such a situation, it might be possible to argue that the individual client and the contingent to which he belongs do have some legal responsibility for exploiting a situation for which they may not be responsible. Clearly, any involvement in organizing women to provide sexual services against their will or in trafficking would entail the responsibility of the individual and possibly also of the contingent. There may also be a positive responsibility on contingents exercising control within an area to protect women from the risk of such activities. That would require them to monitor brothels and activities associated with prostitution to ensure that women are only involved voluntarily. That raises a broader question about the scope of the responsibility of contingents. To what extent do they have a responsibility to protect those under their effective control from the risk of serious human rights violations at the hands of third parties? It is submitted that involvement in organizing women to provide sexual services against their will or in trafficking is within the scope of the study. A good case can be made for considering the responsibility of a force or contingent where individual members use the services of prostitutes where they knew or ought to have known that they were

acting against their will. Guidance would be appreciated as to whether the study should also include an examination of the responsibility of mission personnel to protect women from such risks at the hands of third parties and, if so, whether the study should also include the positive obligation to protect the rights of those under the effective control of international personnel, even where the risk comes from third parties.

5. The working paper will be drafted in the light of the guidance provided by the Sub-Commission and will be submitted at the next session.